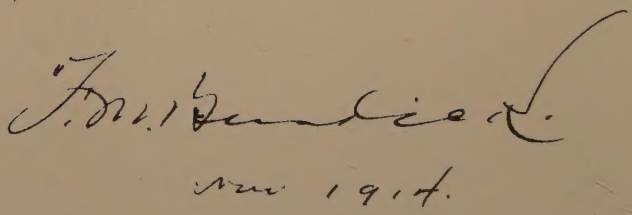
THE LAW OF ASSOCIATIONS
CORPORATE AND UNINCORPORATE [1914]
HERBERT ARTHUR SMITH



THE
LAW OF ASSOCIATIONS

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THE
LAW OF ASSOCIATIONS
CORPORATE AND UNINCORPORATE

BY

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PREFACE

A FEW words will be enough to explain the limited purpose of this little book.

My object has been to inquire into the English law existing at the present day in order to find out whether we can fairly say that it recognizes anything like general principles in its treatment of the rights and liabilities of men acting together in association. From this it will be seen that certain questions, however interesting and important in themselves, fall outside the scope of this essay. Thus, for example, we are not here concerned with the historical problem of the origin of corporations, nor with the question of how our theory of collective personality (if we have one) has been developed in the course of time. Nor, again, have I ventured into the domain of comparative jurisprudence in order to analyse the rules and doctrines that may prevail in other systems. Still less have I attempted to grapple with the problem, so fascinating to philosophers and so dangerous to lawyers, of the 'group-will'.

It is, however, obvious that the interest of this branch of law does and should extend far beyond

the region of merely professional studies. Large questions of Church and State, or of capital and labour, to say nothing of more purely academic problems, are deeply involved in the rules which judges and legislators may devise upon the 'law of associations'. For the study and solution of such questions it seems material to discover, if we can, what are the main principles underlying our existing rules. Beyond an attempt at such inquiry this essay cannot claim to go, and it will have done well if it can induce some one more well equipped than I am to work out the whole problem in full.

For advice and corrections while the book was in manuscript I am much indebted to Professor Geldart, Mr. M. L. Gwyer, Professor Goudy, and Professor J. A. Smith. I need hardly say that they are in no way responsible for any mistakes that may still be found; still less are they committed to any of the opinions that I have tried to urge.

The eighth chapter has recently appeared as an article in the *Juridical Review*, and Messrs. William Green & Sons have kindly consented to its reproduction here.

H. A. S.

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ABBREVIATIONS

A full explanation of the abbreviations for the various law reports will be found at the beginning of each volume of Lord Halsbury's *Laws of England*, and also in some publishers' catalogues. Of text-books the following will be cited by the authors' names only:

Blackstone, *Commentaries on the Laws of England* (1765).
Kyd, *Law of Corporations* (1793).
Grant, *Law of Corporations* (1850).
Carr, *Law of Corporations* (1905).

In Appendix I the ordinary canon law abbreviations are used:

X: the Decretals of Gregory IX in five books.
VI: the Sext, or book of the Decretals of Boniface VIII.

ERRATA AND ADDENDA

Page 1, line 15: for 'civil' read 'Civil'.

Page 10, note 3: for 'Mestro' read 'Mestre'.

Page 73: A recently reported case of *Greenlands, Ltd.*, v *Wilmshurst* ([1913] 3 K.B. 507; 83 L.J.K.B. 1), affords an instance of damages for libel being successfully recovered from an unincorporate association.

INTRODUCTION

Some apology is perhaps needed for the title of this essay. 'Associations' is not yet recognized as a separate subdivision of English Law. We have a law of corporations, the interest of which is now becoming largely antiquarian. Our modern corporations are mostly limited companies, governed by a special code which it takes bulky volumes to expound. Then we have books dealing with partnerships, trade unions, friendly societies, and so on, while some of the matters upon which this essay touches fall, according to the orthodox classification, under the law of trusts.

Now to the Continental lawyer, trained, let us say, upon the German Civil Code or the Code civil, the title would not seem strange. To him the 'Law of Associations' is a well-established subdivision of the law; and this is equivalent to saying that in Continental jurisprudence there are certain general principles upon which the State can recognize and regulate the collective action of men acting lawfully together.

It remains to ask whether, as English law now stands, any such general principles underlie the apparently chaotic mass of rules governing the different forms of association, corporate and

unincorporate. No writer, however 'academic', is at liberty to introduce into the rules a uniformity which is not there, or to pretend that the existing law is the result of the conscious working out in detail of a few broad principles. As a matter of legal history it is beyond all question that the mass of law dealing with these subjects has grown up in a thoroughly haphazard way. But this, after all, might be said of other branches of law, which the genius of learned writers has now shown to be governed in the main by some intelligible general rules. To the early history of contract, for example, we may apply Maine's famous dictum that 'substantive law is secreted in the interstices of procedure'. Yet no one would now deny that the existing English law of contract is governed by principles which are on the whole both intelligible and consistently applied.

The lack of system in historical development does not, therefore, render it impossible to discover common principles in the living law of our own day; but, on the other hand, the example of such subjects as contract and tort must not lead us to assume too lightly that all parts of our law are equally amenable to systematic treatment. The answer to our question must, it is feared, be halting and inconclusive; a plain 'yes' or 'no' is impossible. The truth seems to be that we have developed a few principles which may fairly be called general, and it is due to our modern judges

to say that recent case-law, notably the famous *Taff Vale* decision, has done much to obliterate some of the old technical distinctions between corporate and unincorporate associations. At the same time, these distinctions do occasionally appear where they are least desirable. Our lack of any general theory of juristic personality leads us to legal conclusions which conflict sharply with the substantial facts of life and with the ordinary ideas of men. For example, every layman would regard a body like the Inner Temple or an ordinary members' club as possessing a truer corporate personality than the one-man company where all the shares but six are held by a single individual. Yet the law ascribes legal personality to the latter association and not to the former, with the practical result of enabling an individual to become his own preferred creditor. In such a case it is the popular view which is true to the actual facts, and the legal view which is the theoretical abstraction.

We may see the inadequacy of the legal theory even more strikingly when we come to deal with such a conception as that of the Church of England. Here the law is even at variance with itself. Magna Charta declares that 'the Church of England shall be free', and numerous statutes of mediaeval and modern times refer to 'Ecclesia Anglicana,' 'L'Église d'Engleterre,' 'The Church of England by law established,' and so on. What is this

'Church'?—in the eye of the law, that is to say, for it has a corporate spiritual existence wholly apart from and above the civil law. To apply an infallible test, how could 'the Church' sue or be sued? The answer clearly is that it cannot. We may sue the Archbishop of Canterbury, either personally or in his capacity of a 'corporation sole'. We may sue a dean and chapter, we may sue the Ecclesiastical Commissioners, or we may sue the trustees in whom a particular piece of church property is vested. But 'the Church' we cannot sue. Here is clearly an anomaly, a plain instance of legal theory refusing to recognize facts that stare it in the face. Parliament seems to have seen the inconvenience of this when it disestablished the Irish Church, for the Irish Church Act provided for the legal incorporation of a 'Representative Body' in which all the property of the Church should for the future be vested. But nothing of the sort has been done for the Church of England, the essential unity of which is disguised in the law by a number of more of less clumsy expedients.[1]

It would be easy to show what lamentably grotesque results our lack of logical theory has

[1] In 1907 the Lower House of the Convocation of Canterbury passed the following resolution: 'That, inasmuch as there is no existing body capable of receiving gifts and bequests for the general use and benefit of the Church of England, this House is of opinion that immediate steps should be taken to meet this need.' See also Section I § 6 of the *Report of the Archbishops' Committee on Church Finance* (Longmans, 1911).

produced in our legal handling of the State itself. But any one who writes on this can do little more than reproduce the brilliant article which Maitland once contributed to the *Law Quarterly Review*.[1] Suffice it to say here that we have utterly failed, if indeed we have ever seriously tried, to personify the State in a way that will correspond to the facts of everyday life and the usages of ordinary speech. We have not succeeded in distinguishing effectively between the private and public capacities of the King. No one can say with any certainty who is the debtor that owes the national debt; even our Acts of Parliament use terms like 'the Public' and 'the Crown' without any clear explanation of what they mean, and in the end we are driven to eke out our inadequate legal theory by the clumsy device of enacting that this or that public official shall be a 'corporation sole'.

Englishmen in general and English lawyers in particular are often given to priding themselves upon their neglect of the theoretic logic with which Continental jurists attack legal problems, and this self-complacency, so long as it produces nothing worse than a few picturesque anomalies, is harmless enough. But sometimes the lack of uniform principles produces results that are definitely unjust and oppressive. No one, for example, can regard with satisfaction the facilities for dishonest company finance which have been opened up by the

[1] (1901) xvii. 131; reprinted in *Collected Papers*, iii. 244.

decision in the Salomon case. If the law says that the corporation is distinct from its members in theory, the public is surely entitled to demand that they shall be distinct in fact. Nor, to take another example, is the chaos that followed in Scotland from the Free Church decision a thing very flattering to legal complacency. Whether the writings of academic lawyers can do anything towards the practical simplification of the law upon these matters is very doubtful; but the effort is at any rate worth making.

CHAPTER I

CLASSIFICATION AND MODES OF ORIGIN

A STRANGER to our laws, gaining his institutional learning from Blackstone, would imagine that formal incorporation by the State was a vital necessity whenever any body of men desired to obtain for themselves as a body the privileges of legal continuity and personality.

'To shew the advantages of these incorporations,' says Blackstone, 'let us consider the case of a college in either of our universities, founded *ad studendum et orandum*, for the encouragement and support of religion and learning. If this were a mere voluntary assembly, the individuals which compose it might indeed read, pray, study, and perform scholastic exercises together, so long as they could agree to do so: but they could neither frame nor receive any laws or rules of their own conduct; none, at least, which would have any binding force, for want of a coercive power to create a sufficient obligation. Neither could they be capable of retaining any privileges or immunities: for, if such privileges be attacked, which of all this unconnected assembly has the right, or ability, to defend them? And, when they are dispersed by death or otherwise, how shall they transfer these advantages to another set of students, equally unconnected as themselves? So also, with regard to holding estates or other property, if land be granted for the purposes of religion or learning to twenty individuals not incorporated, there is no legal way of continuing the property to any other

persons for the same purposes, but by endless conveyances from one to the other, as often as the hands are changed. But, when they are consolidated and united into a corporation, they and their successors are then considered as one person in law: as one person, they have one will, which is collected from the sense of the majority of individuals: this one will may establish rules and orders for the regulation of the whole, which are a sort of municipal laws of this little republic; or rules and statutes may be prescribed to it at its creation which are then in the place of natural laws: the privileges and immunities, the estates and possessions, of the corporation, when once vested in them, will be for ever vested, without any new conveyance to new successions; for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies: in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant.'[1]

The blessings of corporate personality could hardly be painted in more vivid colours; and from all this the reader would naturally infer that any 'voluntary assembly' which wanted to obtain legal protection would lose no time in seeking a charter of incorporation. Now, as a matter of fact, there are in this country innumerable bodies, possessing practically all the privileges enumerated by Blackstone, and yet deliberately preferring to remain unincorporate. Such bodies existed, although in smaller numbers, in the eighteenth century, and no better example could be found

[1] i. 467.

than the Inns of Court, in one of which Blackstone himself, as a Bencher, was a member of the governing body. The educated layman would regard the Middle Temple as being substantially no less corporate than the Bank of England or an Oxford college ; and even the technical distinction comes in most cases to have very little effect for practical purposes.

We must, then, begin any attempt at classification by recognizing that the practical benefits and liabilities of juristic personality can in England be obtained by the acts of private individuals acting together without any aid from the State ; and consequently that the different kinds of associations which we must consider will be limited in their variety only by the limits of lawful enterprise. The classification must, therefore, cover a wide field, and, since no classification has as yet obtained the sanction of general approval, it must for the present be tentative and provisional. Of such a kind is the scheme printed at the close of this chapter—a sketch-plan rather than a formal survey of the ground. Bearing in mind this method of arrangement we can now pass on to consider how the various kinds of lawful associations are called into being.

The traditional division of corporations is into corporations aggregate and corporations sole. Of these the latter, consisting, as they do, of one person only, are a legal anomaly lying outside the

strict purview of an essay dealing with associations,[1] and we may therefore pass at once to consider the origin of corporations aggregate.

The theory underlying the formation of a corporation in our law is that it can only derive the attribute of legal personality from the authority, either express or implied, of the Crown. Whether this theory is or is not well founded in history is a problem which there is no need for us, as mere lawyers, to solve.[2] If we are required to answer a question about our early institutions in the terms of modern law, it may even prove impossible to answer it at all; for the English legal theory of corporations is a refined development, and we must always be on our guard against the fallacy of supposing that the men of an earlier based their institutions upon the ideas of a later age.[3] For the modern lawyer the orthodox doctrine is not open to doubt, that you cannot create a legal person without the consent of the Crown.

This, it is said, can be given or implied in various ways. A corporation may exist at common law, 'to which,' says Blackstone, 'our former kings are supposed to have given their concurrence, common law being nothing else but custom, arising from the

[1] On corporations sole see Grant, pp. 626–61; Maitland in *L.Q.R.*, xvi. 335 and xvii. 131; Carr, ch. iv.

[2] See below, Ch. VIII.

[3] On the history of the matter see Carr, ch. ix; Pollock and Maitland, *History of English Law*, i. 486–511; Gierke, *Political Theories of the Middle Ages*, translated, with an important introduction, by Maitland; Mestrø, *Les Personnes morales*.

universal agreement of the whole community.'[1] Such corporations need not, however, detain us, for they all appear to be corporations sole, though there is some rather vague authority for saying that Parliament is a corporation at common law.[2]

Of more importance are those corporations which claim to exist by long prescription. Students of real property law will remember that the doctrine of prescription rests upon the theory, or rather upon the fiction, of a lost grant. Some usage, which might or might not have had a lawful origin, is proved to have existed from 'time immemorial', *nec vi nec clam nec precario*. Now in the eye of the law this could have had no lawful origin except in a grant; therefore, in order to avoid pronouncing the user in question to be unlawful, the Court presumes, unless the contrary is proved, that there was once a grant and that it has, in the course of time, been lost or destroyed. All this at least we say, although we may not believe; and in the law of real property Parliament has partially relieved us from the burden of fictions by prescribing statutory periods after which the enjoyment of the right can no longer be impugned.

The same theory underlies the doctrine of prescription in corporation law. The corporation is bound to prove that it has acted as such, time out of mind, and if this can be proved all the normal incidents of incorporation immediately attach. The

[1] i. 472. [2] Y.B. 14 Hen. VIII, pl. 2.

subsequent grant of a charter, as in the case of the two ancient universities, does not alter the prescriptive nature of the corporation; for prescription implies a royal grant, and the Crown cannot by its second grant derogate from the efficacy of the first.[1] If, however, the corporation is reconstituted by Act of Parliament, the question whether or not it remains a corporation by prescription will of course depend upon the construction of the particular Act, since Parliament, unlike the Crown, can derogate freely from its own or any other grants.

In modern times it can hardly ever be necessary to prove incorporation by prescription. The great majority of the prescriptive corporations are the old municipal boroughs, and these were reduced to a common model by the Municipal Corporations Act of 1835,[2] supplemented by later legislation. Although these Acts have not turned the old corporations into new ones,[3] the statutory admission of their corporate character obviously makes proof of prescription quite superfluous. The same might be said of the universities, and on the whole it is extremely unlikely that at the present day it will be necessary, except in the rarest cases, to rely upon long prescription as evidence of due incorporation.[4]

[1] *R.* v. *Mayor &c. of Stratford-on-Avon* (1811) 14 East, 348.
[2] 5 and 6 Will. IV, c. 76.
[3] *A.-G.* v. *Simon* (1837) 9 Sim. 30.
[4] For a modern case see *Re The Free Fishermen of Faversham*

Where a corporation owes its existence to common law or to prescription, the royal authority is—however fictitiously—implied. Where such authority is preserved in express terms it is called a charter, and this method of founding corporations is still in active use at the present day.

In pre-Reformation times this privilege of granting charters was in certain cases shared by the King with the Pope, and of this we find judicial recognition in the Year-books of 1523.[1] The papal jurisdiction in this matter was of course confined to the founding of ecclesiastical corporations. If we go back earlier still we shall probably find that it was not at all clearly settled who might and who might not grant charters of incorporation; and this is clearly recognized as possible by the Act of 1835, which speaks of 'royal *and other* charters, grants, and letters-patent now in force'. After the Reformation it was of course held that no foreign power could thus share the prerogative of the Crown. But within the kingdom charters might still be granted by subjects, either because they possessed *jura regalia* within certain limits, or because they were

(1887) 36 Ch. D. 329. Lord Loreburn was prepared to regard the Wye fishermen in *Harris* v. *Chesterfield* ([1911] A.C. 623, at 628) as a prescriptive corporation, but he was in a minority of the House.

[1] Y.B. 14 Hen. VIII, pl. 2, *per* Fineux C.J. in *Hecker* v. *Provost &c. of Cambridge*.

acting in pursuance of a special licence from the Crown.

Of the former alternative the best instance is that of the Bishops of Durham, who exercised *jura regalia* within the County Palatine until 1836. Thus the city of Durham itself was incorporated by Bishop Pilkington in 1565, and was governed by a succession of episcopal charters down to the passing of the Municipal Corporations Act; the last of these charters was granted in 1780. It is probably true to say that none of these *jura regalia* are vested in subjects at the present day. By the end of the sixteenth century all the counties palatine had been assimilated to the rest of the country with the exception of Lancaster, Chester, and Durham; of these, Durham, we have seen, has now lost its peculiar position, while the jurisdiction over Lancaster and Chester is vested in the King and the Prince of Wales respectively.

The granting to a subject of a licence to erect corporations has been by no means uncommon. Occasionally it is of a standing nature, as is the case where

> 'the chancellor of the University of Oxford has power by charter to erect corporations; and actually often exerted it in the case of several matriculated companies, now subsisting, of tradesmen subservient to the students.'[1]

But more frequently it takes the form of a special

[1] Blackstone, i. 474. See Appendix II.

licence to erect some particular corporation, and it was in this way that several of the Oxford and Cambridge colleges were founded. In these cases the licence usually sets out the principal terms of incorporation in such detail that little is left to the founder except to repeat the wording of the licence ; this he will be wise to reproduce exactly, for any variation may raise awkward suggestions that he has done something *ultra vires*. The King generally gives him power to provide statutes or by-laws for the internal government of the new body, but apart from this little is left to the discretion of the founder.

No one can be incorporated against his will,[1] therefore, before a charter becomes operative, it must be accepted. When once accepted it is irrevocable by the Crown, and can only be extinguished by surrender, by Act of Parliament, or by some misconduct which will involve its forfeiture after judicial proceedings. Even the acceptance of a new charter does not necessarily involve the surrender or supersession of the old, and many of the older corporations now surviving are governed by a succession of charters.

No particular words are necessary to the validity of a charter, and it is sufficient if an intention to incorporate be clearly shown ; and so it has been held that the conservators of a river were sufficiently incorporated by words which erected them

[1] *R.* v. *Askew* (1768) 4 Burr. 2186, at 2199.

as a permanent body with power to hold lands in succession.[1] Similarly no special form of acceptance is required; whether the charter be original or secondary, an intention to accept can always be inferred from conduct. But acceptance must always be absolute and unconditional. A charter cannot be accepted in part and in part rejected; nor can it be accepted for a time and afterwards repudiated. It would appear that the common law rule even made it impossible for the Crown to grant charters for a limited period of time, and when, as in the case of the Bank of England, it was desired to do so, the sanction of Parliament became necessary. At the present day, however, the Crown possesses by statute the power of incorporating for a limited time.[2]

Where corporations are erected by statute, the operation of the statute may be either direct or indirect. The direct method is now only used in the case of bodies which are intended to have exceptional privileges or to exercise important public functions. Thus railway companies are directly incorporated, since they require large powers of purchasing land, and the creation of a particular railway may gravely affect the

[1] *Conservators of River Tone* v. *Ash* (1829) 10 B. and C. 349. The instrument was in this case a statute, but the principle is the same.

[2] (1835) 1 Vict. c. 73. See p. 106, *infra*. The British South Africa Company holds such a charter.

economic position of a large area. The promoters of every proposed railway are therefore called upon to justify it before a parliamentary committee, at which all the public and private interests affected by the proposed scheme are entitled to be heard. But the great majority of modern corporations are companies formed to carry on some branch of ordinary trade, and it would be obviously inconvenient if Parliament were called on to consider the merits of each individual case. The Companies Consolidation Act of 1908[1] therefore grants the privilege of incorporation to any seven persons who comply with certain specified formalities. By this Act the control of Parliament over the important privilege of incorporation is in effect delegated to the registrar of joint-stock companies.

It sometimes happens that Parliament authorizes the Crown to grant charters of incorporation. In such cases the Crown is bound—at the risk of invalidating the charter—to observe strictly any conditions which the statute may prescribe, and corporations so created are to be regarded as statutory rather than as chartered in the older sense Where, however, the Crown has a common law power of creating corporations, a statutory authority to create them on certain conditions being complied with does not (in the absence of

[1] 8 Ed. VII, c. 69. The foundation of our company law is the Act of 1862, which is substantially incorporated, together with some later statutes, in the Consolidation Act of 1908.

express words) affect the exercise of the common law prerogative ; [1] but in considering the powers of any such corporation it will be necessary to examine carefully the provisions not only of the charter but also of the statute.

Where any question arises of contractual capacity, it becomes important to consider whether the corporation owes its powers to charter or to statute. To this we must return later.[2] Roughly speaking, it may here be said that a corporation created by common law charter can do everything that the charter does not forbid, but a corporation created by statute can do only what the statute expressly or impliedly permits.

When we come to ask how unincorporated associations are formed the answer is simple. All such bodies originate in contract, and no person can become a member except by contracting to do so with the other members. The terms of such contracts are to be found in the express rules of the association, if it has any, and in the purposes for which it exists. If the rules do not provide any machinery for their own alteration they can only be altered with the consent of all the members. But if, as is usual, some machinery for alteration is provided, the members will be bound by any alteration made in proper form.

It is obvious that this principle involves a large element of fiction, and it is one of those cases

[1] *Rutter* v. *Chapman* (1841) 8 M.and W. 1. [2] Ch. II.

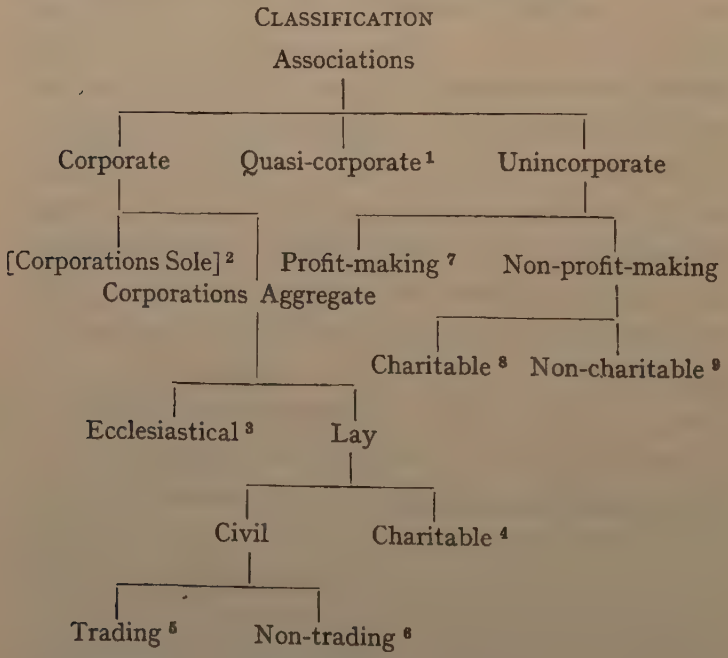
where our law conflicts most sharply with the ideas of ordinary life. The man who accepts election to a club usually regards it as incorporation into a definite body enjoying a continuous existence and formed for the promotion of certain ends. He does not realize that in the eye of the law he is making perhaps a thousand separate contracts with a thousand separate individuals of most of whom he has never even heard. In its anxiety to avoid a fictitious person the law has been driven to imagine myriads of fictitious contracts.

It may be objected that such unincorporate bodies are often dominated by the idea of trust rather than by that of contract. But this is to confuse two stages of a process. The property of such associations is usually held upon trust, and the interest of the members is then equitable instead of legal. But the trust must first be created, and it is created by the contract of those individuals who vest the money or other property in the trustees for the purposes of the association. What binds the members to each other is the contract, and the trust is merely the device which experience has shown to be the most suitable for the convenient administration of the common property.

The celebrated *Free Church Case* [1] marks perhaps the extreme application of this theory that unincorporated groups are governed by contract or by

[1] [1904] A.C. 515. For a fuller account of this case see below, pp. 39–48, 112–114, and Appendix III.

trusts that embody a contract, and there seems to be no escape from the conclusion that even if the dissentient minority of the Free Church had consisted of one member only he would still have been held entitled to the whole of the property in question. So far as the Established Church of Scotland is concerned the *ratio decidendi* of the judgement was quickly cut away by Parliament,[1] and this body has now an inherent power of altering its formulae ; but it will probably be long before our legislature can be induced to raise this exception to the dignity of a principle.



[1] Churches (Scotland) Act, 1905 (5 Ed. VII, c. 12), s. 5.

The following may be taken as typical instances of those classes in the above table which are not further subdivided:

[1] The Miners' Federation; the Ancient Order of Foresters.

[2] The King; the Archbishop of Canterbury; the Postmaster-General.

[3] The Dean and Chapter of St. Paul's.

[4] Magdalen College, Oxford; Winchester College.

[5] The Bank of England; the Midland Railway Company; the Army and Navy Co-operative Society, Limited.

[6] The University of Oxford; the London County Council.

[7] Partnerships. (Owing to s. 1 of the Companies Consolidation Act of 1908 no form of unincorporated trading association of more than twenty members can lawfully be formed).

[8] The Bible Society; the London Library.

[9] The Athenaeum Club.

It is at least questionable whether the classification of certain bodies as 'quasi-corporations' can be defended on strictly logical grounds. But the expression has in practice obtained currency as a description of those societies which are minutely regulated by special statutes without being formally erected into corporations. The bodies usually grouped together under this head are trade unions, friendly societies, industrial and provident societies, and registered working-men's clubs. The older writers, such as Grant, use the term for such bodies as churchwardens, whose position seems rather to resemble that of trustees.

CHAPTER II

RIGHTS AND LIABILITIES IN CONTRACT

The rules of law regulating the contracts of associations are divisible into two main classes, those which affect the capacity of particular bodies to contract, and those which, assuming the contract to be possible, prescribe certain requirements of form. It will be convenient to dispose of the latter first.

Our books generally tell us that the contracts of corporations, subject to certain exceptions, require to be authenticated by the common seal. Thus we find Blackstone saying (i. 475) :

> 'A corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse : it therefore acts and speaks only by its common seal.'

Or, again, we read in Grant (p. 55) :

> 'A corporation aggregate expresses its will wherever strangers are concerned, by its common seal ; and in general nothing of importance can be done by a corporation except under its common seal.'

Among modern writers Sir William Anson says (*Law of Contracts*, 13th ed., p. 74) :

> 'A corporation aggregate can only be bound by contracts under the corporate seal. . . . To this rule there are certain exceptions.'

It is, however, somewhat unsatisfactory to learn

a general rule and then gradually to find out that the exceptions outnumber the instances by many thousands to one. Yet if we take ordinary daily experience as the test in this case it is probably no exaggeration to say that that is what we should find. If, however, we try to reverse the statement of the rule and treat the contracts which must be under seal as the exceptions, there again we shall get into a difficulty ; because it is beyond dispute that as a matter of history the rule requiring the presence of a seal does represent the old principle, and that the exceptions, however numerous they may be in modern times, nevertheless have grown up as exceptions to a general rule.

The seal was required of course for evidential reasons, and its necessity has been defended on those grounds.

'The seal', said Rolfe B. in *Mayor &c. of Ludlow* v. *Charlton*,[1] 'is the only authentic evidence of what the corporation has done or agreed to do. . . . It is a great mistake therefore to speak of the necessity for a seal as a relic of ignorant times. It is no such thing. Either a seal, or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation.'

But in spite of this warning Lord Chief Justice Cockburn in 1869 spoke of the requirement as

[1] (1840) 6 M. and W. 815.

'a relic of barbarous antiquity'; [1] and it is indeed obvious that if the seal or some other formality were an inherent necessity it would not be possible, as it is, to dispense altogether with such requirements in the vast majority of corporation contracts.

From the very earliest times, however, there have been exceptions. The first are those which declare that matters either of minor importance or of daily occurrence do not require the common seal. The exact scope of the former exception has often been the subject of dispute. 'Instances', says Grant (p. 60), 'where the rule has been, and usually is, departed from *to save time*, are the retainer of an inferior servant, the authorizing a person to drive away cattle damage feasant, to make a distress, &c.' For an instance of the second exception reference may be made to the case of *Wells* v. *Mayor &c. of Kingston-on-Hull*,[2] where the corporation were the owners of a dock, and it was held that the daily agreements necessary for the admission of ships were not such as to require the corporate seal.

A further exception was dictated by principles of common honesty. More than once a corporation has entered into important contracts without employing its seal, and the other party has acted

[1] *South of Ireland Colliery Co.* v. *Waddle* (1869) L.R. 4 C.P. 617.

[2] (1875) L.R. 10 C.P. 402.

upon the agreement in good faith, so that the corporation has secured the benefit. In such cases the courts have prevented the scandalous dishonesty which would allow the corporation to retain the benefit, and then on purely technical grounds to refuse payment, by ruling that the work actually done and accepted must be paid for, provided the contract is incidental to the purposes for which the corporation exists.[1] The converse of the rule equally holds good—that is to say, when the corporation has entirely performed its obligations under such a contract, then the other party cannot refuse payment.[2]

The symmetry of this principle has been somewhat marred by a clause in the Public Health Act of 1875,[3] which requires imperatively that the contracts of urban authorities which exceed £50 in value shall be under the corporate seal. As construed by the House of Lords this section has been held sufficient to relieve urban authorities from the obligation of payment even in cases where the full benefit of the contract has been received.[4] As Lord Blackburn said: 'It is true that this works great hardship upon the appellants. . . . It is, however, for the legislature to determine

[1] *Clarke* v. *Cuckfield Union* (1852) 21 L.J.Q.B. 349; *Lawford* v. *Billericay R.D.C.* [1903] 1 K.B. 772.

[2] *Fishmongers' Co.* v. *Robertson* (1843) 5 M. and Gr. 192; 12 L.J.C.P. 185.

[3] 38 and 39 Vict. c. 55, s. 174.

[4] *Young & Co.* v. *Mayor &c. of Leamington* (1883) 8 A.C. 517.

whether the benefits derived by enforcing a general rule, are, or are not, purchased too dearly by occasional hardships. A court of law has only to inquire, "What has the legislature thought fit to enact?" Lord Bramwell's somewhat harsh comment was: 'The decision may be hard in this case on the plaintiffs, who may not have known the law. They and others must be taught it, which can only be done by its enforcement.' [1]

But the widest exception of all was that which exempted contracts made by trading corporations in pursuance of their trade purposes. This was finally established by a decision of the Exchequer Chamber in *South of Ireland Colliery Co.* v. *Waddle*,[2] and its importance in the circumstances of modern times is too obvious to need emphasizing. But Parliament has been even more generous, and by s. 37 of the Companies Act of 1867 [3] companies incorporated under the Act of 1862 were placed on substantially the same footing, so far as questions of form are concerned, as ordinary individuals. The sub-section, as it stands in the present Act, is not too long to be quoted in full:

'Contracts on behalf of a company may be made as follows (that is to say):

[1] Joyce J. has recently held that the section only affects those 'contracts which are necessary for carrying this Act into operation' referred to in s. 173; *Douglass* v. *Rhyl U.D.C.* [1913] 2 Ch. 407.

[2] (1868) L.R. 3 C.P. 463; in Ex. Ch., L.R. 4 C.P. 617.

[3] 30 and 31 Vict. c. 131.

'(1) Any contract which if made between private persons would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company, and may in the same manner be varied or discharged:

'(2) Any contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged:

'(3) Any contract which if made by private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied, and may in the same manner be varied or discharged.'

Since such companies of course form the great majority of modern corporations, it will readily be seen that the corporations to which the old rule applies at all are in number at any rate comparatively insignificant; and even within these narrow limits the admitted exceptions greatly restrict the application of the principle.

At this point it may be noted that in general contracts made on behalf of unincorporated associations, since the law regards them merely as contracts made on behalf of ordinary principals, do not have to comply with any special requirements as to form. If in a particular case any formalities prove to be necessary this will be found to depend upon the requirements of the ordinary law.

We now pass to those principles which affect the substance or validity of the contract apart from any question of form.

The contractual capacity of all persons, whether natural or artificial, is limited in English law by a large number of positive rules. Certain classes of agreements—those which are illegal or immoral, or 'against public policy'—cannot obtain any validity at law, no matter by whom they are made. Other rules restrict the capacity of certain classes of individuals, such as children and lunatics, for whom all systems of law are agreed that some protection must be afforded, although the actual amount of protection will vary in different jurisdictions. Even the contractual capacity of normal adult men to do perfectly lawful things is sometimes restricted by positive rules, such as that rule, perhaps peculiar to the English system, which renders a barrister incapable of contracting for his professional fees. Again, a large number of modern statutes, variously described as 'social reform' or 'grandmotherly legislation', have greatly cut down the freedom of contract between master and servant in cases where the employment is of manual or poorly paid labour.

All these rules have been made at various times and for various reasons, according to the changing notions of policy entertained from time to time by judges and parliaments. If, therefore, the rules governing the capacity of natural men vary so

widely, it will not be in any way surprising to find that in the case of corporations, which the law can make or unmake at its own pleasure, there are very wide divergences in the rules affecting the capacity to contract. Our legal doctrine of corporations—that is to say, the strict legal doctrine, apart from any philosophical or historical speculations [1] —depends upon the theory that corporate personality is a privilege in the exclusive gift of the State, so that the State when making the gift can annex to it any conditions or restrictions that may seem desirable. From this it necessarily follows that the contractual capacity of any particular corporation is a matter within the absolute discretion of the State, as expressed in the instrument of incorporation.

Different rules of construing these instruments prevail according to whether the particular body in question has been incorporated under the old common law prerogative of the Crown or under an Act of Parliament.[2] In the former case the general rule is that the corporation has a *prima facie* right to enter into all those contracts which are lawful to a natural man, except the small number of strictly personal obligations, such as marriage, which are obviously impossible to aggregate bodies. If in a particular case any restrictions exist, they must be found, either expressly or by implication, in the enabling charter.

[1] This theory is more largely discussed in Ch. VIII.

[2] See Ch. I.

'The Crown', says Grant (p. 13), 'may even impose in the charter restrictions upon the incidental rights, privileges, and powers of corporations; but if it does not, then, immediately on the corporation being erected, all the incidents of corporations immediately attach; and all other powers which a corporation exercises must be contained in the charters, or claimed in virtue of the immemorial usage or prescription, which supposes a grant by a charter which has been lost.'

When, however, the corporation owes its origin to an Act of Parliament, the converse is the rule. Nothing is lawful to such a corporation except what is contained, either expressly or by necessary implication, within the four corners of its Act. This was finally settled by the great case of *Ashbury Railway Carriage Co.* v. *Riché*, decided by the House of Lords in 1875.[1] The facts of that case, shortly stated, came to this, that a company which was expressly authorized to build rolling stock entered into a contract to construct a railway. After much difference of opinion in the courts below the House of Lords held the agreement to be *ultra vires*.

'I can only repeat', remarked Lord Selborne (at p. 693), 'what Lord Cranworth stated to be settled law in *Hawkes* v. *Eastern Counties Railway Co.*,[2] when I say that a statutory corporation, created by Act of Parliament for a particular purpose, is limited, as to all its powers, by the purposes of its incorporation as defined in that Act.'

So also in *Wenlock* (*Baroness*) v. *River Dee Co.*,[3]

[1] L.R. 7 H.L. 653.
[2] (1855) 5 H.L.C. 331.
[3] (1888) 36 Ch.D. 685.

a company authorized by statute to borrow money up to a certain amount incurred a debt for a larger sum. The court held that the lender was disentitled to sue for the excess.

A word should be said to explain the application of this rule to the commercial limited company, which is of course the commonest form of a modern corporation. As is well known, the privilege of incorporation is in such cases secured by compliance with certain regulations comprised in a general Act. One of the conditions is that the promoters shall produce for registration two documents, called respectively the memorandum of association and the articles of association.[1] By the former of these the objects for which the company is created have to be defined, and the legal effect of the memorandum then becomes the same as if the objects were set forth in a statute specially constituting the company.

'The present and all other companies incorporated by virtue of the Companies Act of 1862,' said Lord Selborne in the *Ashbury Case* (at p. 693), 'appear to me to be statutory corporations within this principle. The memorandum of association is under that Act their fundamental law, and they are incorporated only for the objects and the purposes expressed in that memorandum. The object and policy of the provisions of the statute . . . would be liable to be defeated, if a contract under the

[1] It is technically possible, but extremely unusual, for a public company to be formed without articles; if there are any, they must be registered (Companies Act, 1908, s. 15).

common seal, which on the face of it transgresses the fundamental law, were not held to be void and *ultra vires* of the company, as well as beyond the powers delegated to its directors or administrators.'

The last words of the passage quoted point to the very different position which is occupied, in the eye of the law, by the articles of association. The memorandum is a constitutional and fundamental law which defines the position and powers of the company with regard to the outside world. The articles are a mutual agreement of the shareholders *inter se*, regulating their rights as against one another, and defining the powers of government delegated by them to their directors. The articles consequently can be altered at any time by special resolution of the shareholders; the memorandum can only be altered in exceptional circumstances and by leave of the court. So also, if the directors exceed their power under the articles, the body of shareholders can adopt and ratify the act on the general ground which enables a principal to ratify the unauthorized doings of his agent. But an act in excess of the powers contained in the memorandum cannot be so ratified, even by the unanimous consent of all the shareholders.

'This being so, it necessarily follows', says Lord Selborne, 'that where there could be no mandate, there cannot be any ratification, and that the assent of all the shareholders can make no difference where a stranger to the company is suing the company itself in its corporate

name upon a contract made under the common seal. No agreement of the shareholders can make that a contract of the corporation which the law says cannot and shall not be so.'

Since the memorandum is always drawn up by the promoters, Parliament has in effect authorized the promoters to determine the limits of their own powers; and the practical result of all this has naturally been that company draftsmen have exercised their ingenuity in drawing up documents which would authorize the company to engage in every conceivable form of human activity. In one case the memorandum was, as North J. remarked, 'so wide that it might be said to warrant the company in giving up banking business and embarking in business with the object of establishing a line of balloons between the earth and the moon.'[1] But the courts have shown some tendency to discourage this expansive style of draftmanship by construing too general words as *ejusdem generis* with the more detailed expressions that have gone before.[2]

The doctrine of *ultra vires* applies also to the contracts of unincorporated associations, but the principle upon which it depends is somewhat different. Corporations proper derive their existence and their powers from a grant of the State,

[1] *Re Crown Bank* (1890) 44 Ch.D., at 641.

[2] See *Stephens* v. *Mysore Reefs Co., Ltd.* [1902] 1 Ch. 745; and *Pedlar* v. *Road Block Gold Mines of India, Ltd.* [1905] 2 Ch. 427.

and the limitation of their powers is therefore to be found within the public document, whether it be a charter or a statute, that brings them into the world of legal being. Voluntary societies on the other hand derive their existence wholly from the consent of private individuals, and it is upon the continuance of that consent that the continuance of such existence must depend. It follows from this that the activities which are *ultra vires* of such a body will be found in such powers as have not been delegated by the consenting members to one another or to their common representatives. In other words the question is always one of contract pure and simple.[1] As a matter of practice such individuals usually record in a number of written rules the conditions upon which their common action is to be based, and new members who subsequently join the body do so on the understanding, either express or implied, that they accept the rules as the terms of their membership. But this is a matter of convenience rather than necessity, and the business of the court in any disputed case is to discover the terms of the contract by which the members are mutually

[1] If the agent who actually makes the agreement exceeds the power so delegated to him, he would presumably be liable to the other party for breach of warranty of authority, unless the other party had notice of the limitations upon his authority. In the case of a corporation making an agreement *ultra vires*, it would seem that the other party has no remedy at all.

bound, whether such contract be formally expressed or only implied.

It is a common-place of contract law that a binding agreement can only be altered or rescinded by the unanimous consent of all the parties thereto. From this it would follow that the rules of a voluntary society, once agreed to, cannot be altered so long as a single member refuses his consent. In order to avoid this inconvenience it is now usual for all well-drafted rules to contain a provision enabling them to be altered by the votes of a two-thirds or other majority of the members. By accepting a set of rules containing such a clause each member is deemed to have given his consent in advance to any alteration made in the prescribed manner. There is nothing to prevent even an increase in the financial liability of the members being so imposed, if the enabling provision is drawn with sufficient clearness; but in the absence of perfectly clear words the courts will not suffer a member to be burdened against his will with any liability beyond the annual or other subscriptions to which he definitely pledged himself upon accepting membership.[1]

A good instance of the rigour with which this rule has been applied may be found in the case of *Harington* v. *Sendall*.[2] In that case the committee of the Oxford and Cambridge Club, finding

[1] *Wise* v. *Perpetual Trustee Co.* [1903] A.C. 139.

[2] [1903] 1 Ch. 92.

that the existing subscription was inadequate to meet the increasing expenses of their society, proposed to raise the amount, and this proposal was adopted at a general meeting. The plaintiff objected, and brought an action to restrain the committee from expelling him for his refusal to pay the larger sum. The evidence showed that previous increases had been accepted by the members (including the plaintiff) without objection, that the consent of the members was all but unanimous, and finally that the step taken was absolutely necessary if the solvency and continued existence of the club were to be secured. The case for the committee was therefore about as strong as it could be, except for the one fact that the power of raising the subscription was not authorized by any express provisions in the rules. But upon this ground Joyce J. felt himself constrained to grant the plaintiff his injunction.

A well-known case on the other side of the line is *Thellusson* v. *Valentia* (*Viscount*),[1] where the committee of the Hurlingham Club decided that they would discontinue the sport of pigeon-shooting. This sport had been one of the objects of the club since its foundation, and a group of members who disliked the change sought to prevent it by invoking the aid of the court. It was held upon the facts that the discontinuance of this sport did not fundamentally affect the objects for which the

[1] [1907] 2 Ch. 1.

club existed, and was therefore covered by the provisions which provided for an alteration of the rules.

In connexion with this case it may be noted that the common proviso for altering the rules will not be so construed as to allow the whole nature of a voluntary society to be fundamentally changed; nevertheless there seems to be no reason why a power to alter even fundamental objects should not be created by sufficiently unambiguous words.

A further restriction of capacity may arise when the theory of contract is complicated by that of trust. It often happens that a society is formed for the purpose of distributing certain benefits or of propagating certain views. The property given to such a society is then deemed to be given in trust for the furtherance of these objects, and certain persons then become beneficially interested in the administration of the property according to the terms of the trust. Such persons will usually be a class, often very large in numbers and continually changing by the loss of old or the accession of new members. If the property is administered in such a way that any part of the benefit goes to persons who are not members of the class contemplated by the donor, then a breach of trust is committed, and the proper beneficiaries are entitled to claim the appropriate legal remedies.

It is again a common-place of the law of trusts that a breach of trust once committed can only be healed by the unanimous concurrence of all the

beneficiaries. It will therefore follow that no matter how ancient the institution of the trust may be or what unforeseen changes may in the course of time have taken place, no departure from the strict terms of the original institution can be safely made without the concurrence of all the numerous persons thereby affected. Such a consent is of course in practice quite impossible to obtain, and the practical result would therefore be that all such trusts were permanently unalterable.

To meet this difficulty two expedients have been adopted, though neither of them provides for all possible contingencies. One is to be found in the doctrine of *cy-près*. This means that where the performance of any charitable trust according to the strict terms of the original institution has become impossible the court will sanction an alternative scheme resembling 'as nearly as possible' that originally contemplated. In other words the court takes the liberty of guessing at what would have been the testator's charitable wishes could he have foreseen the failure of his main object.

The *cy-près* doctrine is a rule of equity. The second expedient is statutory. In 1853 the Charitable Trusts Act[1] created a Board of Charity Commissioners for the general regulation and supervision of all charitable trusts (with certain exceptions). These commissioners were given

[1] 18 and 19 Vict. c. 124.

power, in proper cases and upon the application of parties interested, to make out new schemes for the administration of charities, such schemes to be subject to the approval of Parliament and if approved to have statutory effect.

It will be observed that neither the equitable rule nor the statutory powers touch the case where the literal performance of the original trust is still perfectly possible, and the only reason for making any change is that a change is desired by the majority of the persons concerned.[1]

The difficulty here has become most prominent in the case of voluntary religious societies, and perhaps the most celebrated of such disputes is the famous *Free Church Case*, which came before the House of Lords in 1904.[2] But before considering the details of this controversy it may be well to quote the principle of law applicable to such cases as laid down by Lord Eldon in *Craigdallie* v. *Aikman*,[3] and adopted by Lord Halsbury in the later case :

[1] The principles upon which this jurisdiction is exercised are very clearly explained by Farwell L.J. in the *Weir Hospital Case* ([1910] 2 Ch. 124), where the Charity Commissioners had attempted to disobey a testator's instructions merely because they thought another scheme was better.

[2] *Free Church of Scotland* v. *Overtoun* (*Lord*) [1904] A.C. 515 ; authorized and full report by R. L. Orr, *The Free Church of Scotland Appeals*, to which the references in this essay are made.

[3] (1820) 1 Dow 1, at 16. This also was a case of differences between two rival Presbyterian bodies—differences which even the Court of Session declared to be quite unintelligible.

'With respect to the doctrine of the English law upon this subject, if property was given in trust for A, B, C, &c., forming a congregation for religious worship; if the instrument provided for the case of a schism, then the Court would act upon it; but if there was no such provision in the instrument, and the congregation happened to divide, he did not find that the law of England would execute the trust for a religious society, at the expense of a forfeiture of their property by the *cestui que trust*, for adhering to the opinions and principles in which the congregation had originally united. He found no case which authorized him to say that the Court would enforce such a trust, not for those who adhered to the original principles of the society, but merely with a reference to the majority. . . . If it were distinctly intended that the Synod should direct the use of the property, that ought to have been matter of contract, and then the Court might act upon it; but there must be evidence of such a contract and here he could find none.'

After citing this and other cases Lord Halsbury proceeded (at p. 565):

'The principles for decision thus propounded have been recognized and acted upon ever since, and it would seem that it may be laid down that no question of the majority of persons can affect the question, but the original purposes of the trust must be the guide.'

Before examining the application of this to the *Free Church Case* we should note another Scotch appeal of *Forbes* v. *Eden*, decided by the House of Lords in 1867.[1] In that case a clergyman of the Scottish Episcopal Church raised an action to

[1] 5 Macph. H.L. 36. For a fuller discussion of this case see Taylor-Innes, *Law of Creeds in Scotland* (2nd ed.), pp. 277–286.

challenge the validity of certain canons enacted by the Synod of that body, which altered the canons that had been in force at the time of his own ordination. In moving the dismissal of the appeal Lord Cranworth, after pointing out that the pursuer had rested his case on the analogy of partnership law, went on to say (at p. 51) :

'But the Synod of a Church seems to me rather to resemble the Legislature of a State than the articles of association of a partnership. A religious body, whether connected with the State or not, forms an *imperium in imperio*, of which the Synod is the supreme body, when there is not, as there is in the Church of England, a temporal head. If this is so, I feel it impossible to say that any canons which they establish can be *ultra vires*. The authority of the Synod is supreme.'

It should, however, be pointed out in this case, first, that the canons existing when the appellant was ordained contained provisions for their own alteration, and, secondly, that the alteration in question touched no question of doctrine, but one of practice only.

The Free Church dispute, so far as it can be shortly stated, arose in this way. In 1843, a large number of members of the Established Church in Scotland, dissatisfied with the system of patronage then existing, seceded from the main body and called themselves the ' Free Church of Scotland '. Both those who seceded and those who remained claimed equally to be the true 'Church of Scotland', and each party believed that it was the duty of

the civil power to support the true Church as a State establishment.[1] The secession of 1843 was of course not the first that had taken place, and there were at the time other independent Presbyterian bodies already existing in Scotland. Towards the end of the nineteenth century proposals were made for the union of the Free Church with one of these societies, then known as the 'United Presbyterians', who did not believe in the principle of State establishment. In 1892 a step was taken towards union by a 'Declaratory Act' of the Free Church Assembly which, it was alleged, modified the existing doctrine of the Free Church upon the authority of the Westminster Confession generally, and in particular upon the question of predestination, so as to make it more acceptable to the United Presbyterians. Finally, an Act for effecting a complete union was sanctioned in the Free Church Assembly on October 30, 1900, by a majority of 643 votes to 27. When this was passed the minority, considering the whole proceedings to be *ultra vires*, immediately withdrew, declaring that they and their supporters were the true Free Church and as such entitled to its property. Whether or not this contention was well founded was the question for the courts.

In Scotland the Lord Ordinary (Lord Low) and the judges of the Inner House held that the change

[1] The formal statement of this principle will be found in ch. xxiii of the Westminster Confession of 1645.

of position with regard to establishment was not a matter of fundamental principle and therefore lay within the competence of the Assembly. In deciding this the Lord Justice Clerk (Lord Kingsburgh), Lord Trayner, and Lord Low all held that if it had been fundamental the act of union would have been *ultra vires*. But Lord Young went much farther in conceding a wide power of legislation to the Church, remarking (at p. 74):

'I desire to say there is, in my opinion, no rule of law to prevent a dissenting church from abandoning a religious doctrine or principle, however essential or fundamental, or from returning to it again with or without qualification or modification. Whether or not a property title is such that a forfeiture of property will follow . . . is another matter.'

None of the judges in the Scottish Courts expressed any opinion upon the more strictly doctrinal point about predestination.

Upon appeal the judgement in favour of the United Free Church was reversed by a majority of the House of Lords. The five judges[1] forming the majority concurred in holding, first, that it was *ultra vires* of any religious body to alter its fundamental principles, and, secondly, that the doctrine of establishment in the case before them was a principle of this nature. Lord Halsbury and Lord Davey also held that the respondent community had departed from its original principles in the matter of predestination.

[1] Lords Halsbury, Davey, James, Robertson, and Alverstone.

On the other hand Lord Macnaghten, in an eloquent, though perhaps slightly rhetorical, opinion, held that 'this question about the establishment principle is a very small question indeed', and based his judgement in favour of the respondents upon the broad ground that the Free Church could modify her formulae even to the extent of altering the Confession of Faith. Lord Lindley, on the same side, substantially adopted the reasoning of the Scottish Courts.

This celebrated case is worth dwelling upon at some length, because it is the best illustration of what is the logical outcome of the strict contract doctrine as applied to such associations. The different conclusions at which the judges arrived should not blind us to the fact that there was a genuine agreement (from the purely legal point of view) upon the root principle. 'We are agreed here,' said Mr. Haldane in argument for the respondents (at p. 513), 'that the question is one primarily of contract, and secondly, of trust springing from that contract, and the question is, What was the contract and what was the trust which they set up amongst themselves? and it is that contract and that trust that we have got to examine.' In other words, the difference between the two parties came to this: The appellants said that the original contract of union in 1843 did not permit the alteration of fundamental principles, and that the Act of Assembly of 1900

was such an alteration. The respondents claimed that any one joining the Free Church impliedly consented to accept the full legislative authority of the Assembly over all ecclesiastical matters, including those of fundamental importance. If the Court were not willing to concede this they maintained that at any rate the alterations in question were not of this fundamental nature.

But in such cases as these even the admitted legal principle does not seem to be quite free from difficulty. It was agreed on both sides that the actual numbers of the majority were immaterial, and even if the dissentient minority had consisted of one individual only, that individual would have been equally well entitled to regard himself as the true Free Church and claim the control of all its property throughout the world.[1] But from this it would seem to follow that unanimity in such a case is not only impracticable but legally impossible. Almost all Christian communities admit by means of baptism children in earliest infancy to membership of the Christian body, and the membership and rights of such children are in no way inferior to those of the adult communicants. But from the legal point of view (in England at any rate) these infants are incapable of giving their consent to any act in the law whereby they would be divested of any beneficial rights; in

[1] See *e.g.* Lord Young (at p. 74), and Lord Robertson (at p. 593).

other words, they have no power to authorize or excuse a breach of trust. The court can of course give its consent on behalf of the infant—its ward—in a proper case, where the proposed act is clearly shown to be for the infant's benefit, and from time to time our judges are placed in the embarrassing position of having to determine whether a particular child shall be, let us say, a Christian or a Jew. But the idea of the court considering on behalf of thousands of individual wards whether or not it is expedient to modify the Westminster Confession of Divines is too grotesque to merit serious discussion.

The true solution would seem to be, that in the case of a religious community having a doctrinal basis the State courts should altogether refrain from endeavouring to define those doctrines. The courts must of course determine all questions of property, and it may often be the case that only those persons who maintain certain doctrines are entitled to the enjoyment of certain property. But in ascertaining what the doctrines are the secular judge should be content to accept the ruling of whatever is the authoritative organ of the community in question. In other words, the civil court should treat the decision of the ecclesiastical tribunal upon such a matter with the same respect as it treats the judgement of a foreign court upon a question properly within the foreign jurisdiction. This would still leave it open to

the secular judge to inquire whether the proper and normal procedure had been followed, and to see in short whether there was any irregularity apparent on the face of the proceedings. But if everything is *prima facie* in order the civil court should accept the ecclesiastical ruling upon a doctrinal point as the judgement of a foreign or domestic tribunal acting properly within its jurisdiction.[1] Otherwise we are inevitably landed in great difficulties ; and these difficulties are not merely technical. The lamentable history of the Privy Council decisions in the so-called ' Ritual Cases ' has taught us by now that the rulings of secular judges upon matters of doctrine and worship carry no moral authority whatever and are in practice almost impossible to enforce.[2]

Some such considerations as these may have been present to the mind of Parliament when it modified by statute the somewhat harsh effects of this judgement. In 1905 an Act was passed[3] directing that the property in dispute should be divided roughly according to the proportion of

[1] In some jurisdictions this principle has been substantially adopted by the courts ; see the *Report of the Royal Commission on Ecclesiastical Courts* (1883), pp. viii–xiv. Mr. Gwyer informs me that it was also the practice of the late Judge Bacon, when sitting as a County Court Judge in the East End, to treat the rulings of the Chief Rabbi's court as authoritative upon questions of Jewish law.

[2] See the *Report of the Royal Commission on Ecclesiastical Discipline* (1906), pp. 66–7.

[3] 5 Edw. VII, c. 12.

adherents of the respective Churches in each district; and by s. 5 of the same Act it was provided that in future the Established Church of Scotland should have the power to modify its own formulae. A somewhat similar principle seems to underlie the provision of Lord Lyndhurst's Act (1842),[1] that where any dispute should arise as to the doctrinal terms of any Nonconformist trust the matter should (in the absence of any written instrument) be decided by the usage of the last twenty-five years; and a clause to the same effect was inserted in the Roman Catholic Charities Act of 1860,[2] directing that in the administration of such charities the evidence of twenty years' usage should (in the absence of any written instrument) prevail.

It cannot be said that the law on this subject is at present in a satisfactory state, and until a rule resting upon some clear principle is laid down by Parliament the law must be regarded as uncertain in its doctrine and likely to prove harsh in its practical application.

[1] 7 and 8 Vict. c. 45, s. 2. The practical reason for this was that in the case of a large number of chapels which had been originally built for Presbyterians the congregations had gradually adopted more or less Unitarian beliefs. When the congregations were originally formed in the seventeenth century the profession of Unitarian principles was illegal, and the courts were therefore debarred, before Lord Lyndhurst's Act, from construing the original trust deeds in a Unitarian sense. These instruments were usually very vague in their doctrinal definitions.

[2] 23 and 24 Vict. c. 134, s. 5.

The club and the religious society form perhaps the commonest kind of non-commercial unincorporated bodies. Where persons combine for purposes of trade they form a partnership, and it is laid down in the Companies Act that the number of an unincorporated partnership must not exceed twenty members.[1] So far as the contracts of such firms are concerned, the law rests upon the principle that each partner is the agent of the firm for all purposes of the common business, including the making of negotiable instruments. This implied power may always be restricted by express agreement, but strangers ignorant of the restriction may of course rely upon the apparent as well as upon the real authority of every partner.

It remains to say a word about those bodies which we have classified as 'quasi-corporations'. such as trade unions and friendly societies—bodies which are regulated and assisted, but not created, by Acts of Parliament. The question of their contractual capacity came to a head recently in a celebrated case where an injunction was sought to restrain a trade union registered under the Act of 1876 from applying its funds to the payment of election expenses and the maintenance of Labour members in Parliament. The injunction was granted by the Court of Appeal and confirmed

[1] 8 Edw. VII, c. 69, s. 1.

by the House of Lords.[1] Various reasons were advanced for this, but the principle underlying the decision of the majority was that trade unions came within the reasoning of the *Ashbury Case*[2] and were therefore limited in their activities to those objects which the enabling statute either expressly or impliedly allowed. This decision, like that in the *Taff Vale Case*, has aroused a good deal of political controversy, and its practical effect has now been partly abrogated by a recent statute.[3] But the mere fact that a statute has been found necessary to give the unions the desired powers can only serve to emphasize the principle upon which the decision rests.

A question has been raised as to whether the principle of the *Osborne Case* applies to those unions which have retained their purely voluntary status by not accepting registration under the Trade Union Acts. The language of the judgements in the House of Lords is not quite consistent and leaves the matter in some doubt ; but in any case the question was not one which the House was then in a position to decide. Apart from this there is a *dictum* of Lord Skerrington in the Court of Session to the effect that unregistered

[1] *Amalgamated Society of Railway Servants* v. *Osborne* (No. 1), [1910] A.C. 87.

[2] (1875) L.R. 7 H.L. 653.

[3] Trade Union Act, 1913 (2 and 3 Geo. V, c. 30).

unions fall outside the principle of the decision,[1] while Professor Geldart has called attention to a case in the Chancery Court of Lancaster, where an opposite view was taken by Vice-Chancellor Leigh Clare.[2]

So far we have dealt mainly with matters of general principle, and with questions of the ability of corporations to make particular contracts an essay such as this is naturally not concerned. From what has been said it will be obvious that generally speaking the question of whether any particular act is or is not *ultra vires* is one to be decided solely upon the construction of a particular document, and no question of principle with which we have to deal can really be made much clearer by elaborating particular decisions. The courts will often allow to one company powers which they will deny to another company of very similar character,[3] and the only rules by which they are guided will be the canons of construction. One or two points of general application remain, however, to be noticed.

The first of these questions is one of great importance, especially under the conditions of

[1] *Wilson* v. *Scottish Typographical Association* (1911) 1 Sc. L.T. 253.

[2] 25 *Harvard Law Review*, p. 600. Professor Geldart himself gives strong reasons for favouring Lord Skerrington's view.

[3] For example, contrast *Stephens* v. *Mysore Reefs Ltd.* [1902] 1 Ch. 745 with *Pedlar* v. *Road Block Gold Mines of India, Ltd.* [1905] 2 Ch. 427.

modern times. How far, we ask, can a corporation contract with one of its own corporators? Upon the answer to this question results of the gravest consequence depend, and different answers have been given at different times.

There is an old case in the Year Books where the Mayor of Newcastle took a bond from the corporation—that is to say, the 'Mayor and Commonalty'—of that town. This bond was declared to be void by the Court, on the ground that a man cannot be held bound to himself.[1] Such a case is of course no authority for the present law, though it is perhaps still true that where a corporation consists of two essential parts, such as a dean and chapter, neither of the two parts can be bound to the corporation as a whole.

Coming to modern times we find that the right of corporations to contract with their own members is in daily practice universally admitted. No one has ever disputed the right of a railway shareholder to buy a ticket for travelling over his own line; and indeed he would become liable to criminal penalties if he tried to travel in any other way.

The only cases where difficulties have arisen are those in which the contracting member is the controlling power in his own corporation. We shall have occasion to refer later to the case of

[1] Y.B. 21 Edw. IV, f. 15; Pollock and Maitland, *H.E.L.*, i. 492.

Foster & Sons, Ltd. v. *Commissioners of Inland Revenue*,[1] where eight partners contracted to transfer their business to a limited company consisting of themselves alone, and the Court held that the transaction was a 'sale' in the eye of the law. But in 1896 the question was raised before the House of Lords in a more serious form in the important case of *Salomon* v. *Salomon & Co. Ltd.*[2]

Mr. Aron Salomon was a bootmaker in Whitechapel, who traded at first on his own account, but later decided to avail himself of the advantages afforded by limited liability under the Companies Acts. In order to effect this he 'sold' his business to a company in which he himself held all the shares except six, which stood in the names of other members of his family. Upon its formation the company issued debentures to Mr. Salomon in his individual capacity.

Now a debenture-holder is in the eye of the law not a member of the company, but a secured creditor, and as such enjoying a preference over other creditors. So the substantial question in this case was whether debentures issued by a 'one-man company' to its only real member should be allowed to have a preference over the bona fide unsecured creditors of the firm. In other words must it be said that the Companies

[1] [1894] 1 Q.B. 516; *infra*, p. 84.
[2] [1897] A.C. 22.

Acts had created a machinery by means of which any trader, upon complying with certain simple formalities, could really become his own principal and preferred creditor ?

This question was answered in the negative by Vaughan Williams J. and the Court of Appeal.[1] Lord Justice Lindley called the scheme a ' device to defraud creditors ', and said it was calculated to ' bring into disrepute one of the most useful statutes of modern times, by perverting its legitimate use '. Lord Justice Lopes said that ' one substantial man and six mere dummies ' could not be allowed to constitute a company. Mr. Salomon was accordingly declared to be a trustee of his interest for the company and its bona fide creditors.

Upon further appeal the decision was reversed, the House of Lords taking the more technical view that a corporation in all cases possessed a distinct personality from its members, and therefore could contract freely with any member, irrespective of the interest he might have in its property and the control he might exercise over its affairs. ' There is nothing in the Act,' said Lord Macnaghten, ' requiring that the subscribers to the memorandum should be independent or unconnected, or that they or any of them should take a substantial interest in the undertaking, or that they should have a mind and will of their

[1] [1895] 2 Ch. 323.

own—as one of the learned judges seemed to think—or that there should be anything like a balance of power in the constitution of the company. . . . The company is not in law the agent of the subscribers or trustee for them.'

Upon the construction of the statute we must of course accept the interpretation adopted by the House of Lords ; but the practical application of the principles there laid down has unfortunately become one of the most familiar features of modern company finance, and it is much to be regretted that no means have as yet been devised of ensuring that the independent personality shall not be recognized by the law unless it has a real existence in fact.

In this connexion we should notice a case of *Bath* v. *Standard Land Co.*,[1] in which the plaintiff, a land-owner, employed the company to manage, realize, and develop his estates. The directors thereupon entrusted the necessary professional work to themselves in their private capacities, a procedure which was authorized by the articles of association. The practical result of this would have been that the plaintiff, who was to pay a percentage of the net profits, would have to remunerate the same individuals twice over for one piece of work. Neville J. held that the arrangement could not be supported against the plaintiff, who was a stranger to the articles of

[1] [1910] 2 Ch. 408 ; [1911] 1 Ch. 618.

association ; the directors were ' the brains and the only brains of a company ', which paid them a salary for their work. The decision was reversed upon this point by a majority of the Court of Appeal, but on the other hand we find the Irish Court of Appeal[1] taking the same view as Neville J. It remains for the House of Lords to tell us the truth.

As for the contracts of unincorporated bodies, it is hardly necessary in this connexion to do more than refer to the case of *Graff* v. *Evans*,[2] the facts of which will be found in another chapter. Where a member of such a society enters into what a layman would regard as a contract with the whole body the law regards him as contracting with all the other members individually through the agency of an officer or servant. Any restrictions upon this power of contracting, if they exist at all, must be found in the rules of the society.

A corporation as such has no implied power of borrowing money, nor is it entitled to incur any liability upon negotiable instruments except that it may draw cheques upon its current account at the bank.[3] A borrowing power may of course be conferred by the instrument of incorporation, and

[1] *Kavanagh* v. *Workingman's Benefit Building Society*, [1896] 1 Ir. R. 56.

[2] (1881) 8 Q.B.D. 373 ; *infra*, p. 85.

[3] *Bateman* v. *Mid-Wales Railway Co.* (1866) L.R. 1 C.P. 499. The corporation can transfer the property in a bill by endorsement, although it cannot incur liability.

if so it is usually limited in quantity, and any one lending money to the corporation in excess of the authorized sum does so at his own risk.[1] Where, however, the corporation is of a trading character there is an implied power both to borrow money and to incur liability on bills or other instruments; but companies formed to carry on public undertakings, such as railways and waterworks, do not come within this exception.[2] Nor is incorporation under the Companies Acts sufficient of itself to confer the implied power, although it always can be and usually is conferred by the memorandum and articles.[3]

In the case of a partnership the mutual authority of the members extends to the borrowing of money and the making of negotiable instruments. But in clubs and other voluntary societies the committee or governing body have in general no such power except where it has been expressly conferred by the rules. Apart from any such provision they can only bind the credit of the society to the extent of the funds in hand or due from the members. The best instance of this rule in the reports is the case of *Wise* v. *Perpetual Trustee Co.*,[4] where the trustees of an ordinary social club had personally expended large sums in discharging

[1] *Wenlock (Baroness)* v. *River Dee Co.* (1887) 36 Ch. D. 674.
[2] *Bateman* v. *Mid-Wales Railway Co., supra.*
[3] *Re Peruvian Railway Co.* (1867) L.R. 2 Ch. App. 617.
[4] [1903] A.C. 139.

the covenants relating to the club's leasehold property. They then brought an action in which they sought to be indemnified by the individual members, but the Privy Council held that the claim could not be maintained at law.

The practical result of the law is that most well-drafted codes of club rules will contain such authority as is likely to be needed. Borrowing is generally now effected by means of debentures creating a charge on the club property and containing a clause sufficient to protect the trustees from personal liability.

CHAPTER III

RIGHTS AND LIABILITIES IN TORT

It is now fairly well settled that the question of corporate liability in tort is one to be decided by the ordinary law of agency. Corporations can only act through agents, and the only question we now ask is: 'Was the actual offender acting within the scope of his authority?' If so, the person who employs him will be liable, whether such person be natural or artificial.

But this result has only been slowly reached, and for the slowness of our law in arriving at so simple a solution of the problem we must chiefly blame those lawyers who have been tempted to make unwarranted excursions into the unfamiliar domain of metaphysics.

Now when Pope Innocent IV declared in 1245 that a corporation cannot be excommunicated, he was treading on firm ground. A corporation cannot be excluded from communion because it cannot in the nature of things receive communion;[1]

[1] In fairness to the Pope it should be stated that the actual reason given by him was even simpler, namely, the danger that such an excommunication might include innocent individuals. For a fuller discussion of this point see Appendix I. It is quite clear from the text that the excommunication was regarded, not as a sentence upon the body corporate, but merely as a summary form of excommunicating all the individuals who composed it.

just as we might say that it cannot be divorced because in the nature of things it cannot marry. But when English lawyers went on to argue that because a corporation had no mind it could not be liable for an injury in which malice was essential, they were forcing the obvious distinction into a region where it was entirely irrelevant. If logically worked out the theory would abolish all corporate liability, and not only liability in those cases where the presence of some state of mind had to be proved. Physical acts are of necessity no less purely individual characteristics than are the mental conditions out of which they arise. Thus an assault or an ordinary libel must be the act of an individual no less than a malicious prosecution or a libel in which it is necessary for the plaintiff to prove malice. Even the authority of the individual agent must be given to him immediately by some other individual. So the formula that corporations can only act through agents does not really help us, for the appointment of an agent is in itself an act ; and if this act also is performed through another agent the chain of agency seems to become infinite. It would seem in short that if we allow ourselves to wander into the region of metaphysics we are logically driven to a conclusion which would relieve corporations from all liability, not only in tort, but in contract as well.

Plainly, then, some non-metaphysical solution

must be found, and it has been found in English law by applying the ordinary principles of agency. The reason for this solution will be easier to understand if we examine carefully the root-principle of the familiar rule which in our system makes the master liable for all acts of his servant committed within the scope of that servant's authority.

In the first place it is well to remember that the English rule is by no means a self-evident axiom of natural justice, but differs widely from the rules prevalent in other systems. It is in fact a choice, based upon reasons of policy, between two alternatives, for each of which there is much to be said.

One of these alternative principles is to say that no man shall suffer in damages for any unlawful act, unless it was in some degree his own doing or unless he is for some reason personally to blame. If he has actually authorized another to do the act complained of, or if he has failed to exercise due care in the choice of his servants or in the provision of his machinery, then by all means let him be liable; but it is essentially unjust to make him pay for a wrong which is wholly the act of another, even though committed in the course of the master's business or for his benefit. Such, it would seem, is the principle underlying Section 831 of the German Civil Code:

'A person who employs another to do any work is bound to compensate for any damage which the other unlawfully causes to a third party in the performance of

his work. The duty to compensate does not arise if the employer has exercised ordinary care in the selection of the employee, and, where he has to supply appliances or implements or to superintend the work, has also exercised ordinary care as regards such supply or superintendence, or if the damage would have arisen notwithstanding the exercise of such care.'[1]

The other alternative principle proceeds on these grounds. The only persons who can be proved to have committed or actually to have authorized unlawful acts are very commonly persons of no means, against whom the remedy in damages would be entirely illusory. The existence of actual authority between master and servant is a thing which it is always very hard to prove and very easy to disprove. If, therefore, you allow principals to escape liability for all acts except those which have been occasioned by their actual authority or personal negligence, you will be opening a wide door to fraud. Men of straw will continually be employed to cause injury to others, and nothing will then be easier than to conceal the link of authority binding them to their employers. It is upon this ground of policy that the English rule is based.

[1] Wang's translation. Dr. Wang points out that the *onus probandi* rests on the employer. (A foreign lawyer must of course approach the Code with some lack of confidence in his own powers of interpretation, but here the meaning seems to be quite clear.) It may be noted that where the employer is an 'association' its liability is wider and approximates to that recognized by our law (*Civil Code*, § 31).

So widely has this principle of our law been extended that the master has been held liable even in cases where the servant was disobeying printed orders ;[1] and, more recently, a solicitor has been held liable for a gross fraud committed by his clerk upon a client wholly for the benefit of the clerk.[2] Whether the English or the continental principle is the better is a question with which we are not here concerned. In spite of much adverse criticism the more severe rule of vicarious liability is now too firmly established in our law to be shaken by anything short of an Act of Parliament ; and indeed the tendency of the most recent decisions has been rather to extend than to curtail the application of the principle.

Now it is clear that this theory attaches the liability for wrongful acts quite independently of any question of moral blame. In a very large number of cases it amounts to a rule for determining which of two innocent parties shall bear the loss occasioned by the misdoing of a third ; and the rule is based upon ground of public policy rather than upon any considerations of personal

[1] *Limpus* v. *London General Omnibus Co.* (1862) 1 H. and C. 526.

[2] *Lloyd* v. *Grace, Smith, & Co.* [1912] A.C. 716 ; the dictum of Willes J. in *Barwick* v. *English Joint Stock Bank* (1867) L.R. 2 Ex. 259, that the act must be committed ' in the course of the service and for the master's benefit ', should now be read subject to the explanation of the later case.

negligence or other moral guilt.[1] If this be so it is no less obvious that the difficulty of making corporations responsible for the misdeeds of their agents entirely disappears. The considerations of policy which make the natural master liable apply if anything more strongly to those cases where the master is a corporate person. The perplexing questions which have been put forward at various times have all originated in the purely philosophical difficulty of 'imputing malice' or other moral guilt to a body corporate, and when these speculative problems are ruled out as irrelevant[2] the difficulties which they engender can no longer arise. As a matter of fact it is somewhat unfortunate that the phrase 'imputing malice' has found its way into the language of law. The liability of the natural principal for the act of his agent does not depend upon 'imputing' to him some fraud or malice of which he can in many cases be proved to be entirely innocent. It rests upon the theory that it is in the public interest that the principal's property should be the fund to which the injured party may (if he so wishes) look for compensation. The master, in short, is put in the position of being compelled to insure the public against the misconduct of those who act

[1] Of course all systems of law agree that the actually guilty parties must pay—if they can.

[2] As, for example, by the Privy Council in *Citizens' Life Assurance Co.* v. *Brown* [1904] A.C. 423; see p. 129 *infra*.

in his employment; or, in Lord Cranworth's words, 'to guarantee third persons against all hurt arising from the carelessness of himself or of those acting under his orders in the course of his business.' [1]

If then the insurance of the public is the true principle it obviously becomes immaterial to inquire what is the nature of the hands in which the insurance fund is held. To third parties it cannot possibly matter whether the property in question is owned by one person or by many, by a natural man or by a corporation. The grounds of public policy upon which his right to compensation rests apply equally to all these cases; if they apply more strongly to one case than to another, it is to the case of a powerful and wealthy corporation, which otherwise would be enabled to commit civil injury with practical impunity. Further, this doctrine has at any rate the great merit of relieving courts of law from the necessity of wrestling with problems of metaphysics.

That being so, the question of corporate liability in tort becomes merely an application of the wider law of agency—a subject the pursuit of which would carry us too far beyond the limits of this inquiry. One or two points, however, seem to require a passing notice.

It has been sometimes said that a corporation

[1] *Barton's Hill Coal Co.* v. *Reid* (1858) 3 Macq. H.L. 266, at 283.

is not liable if the wrong complained of is an *ultra vires* act. The element of truth in this statement makes it somewhat apt to mislead. It rests mainly upon a well-known case of *Poulton* v. *London and South-Western Railway Co.*,[1] where the plaintiff was arrested and detained by a station-master on a charge of having attempted to convey a horse by rail without a ticket. Now even if the facts had been as the station-master imagined them to be, the by-laws of the company gave him no authority to arrest the plaintiff. A man can be arrested for trying to travel without a ticket for himself, but not for sending his horse without a ticket. For this reason the Court held that the company was not liable; there was no express authority, and the company could not be held to have given an implied authority to do an act in excess of its own corporate powers.

Now in one sense every wrongful act is *ultra vires* of every corporation, and at first sight the decision in *Poulton's Case* might seem to exempt corporations from all liability in tort. But in reality the case does no more than provide a test for determining whether an authority, which admittedly is not express, can be implied. The question we have to ask in each case is: Had the agent authority to do the class of acts out of which the wrong arose? The burden of proving the affirmative rests upon the plaintiff. So in

[1] (1867) L.R. 2 Q.B. 534.

Poulton's Case the plaintiff clearly could not show that the station-master had express authority to arrest him, and there was no evidence that the company had impliedly authorized him to do an act beyond the powers of the corporation itself. If, however, the agent has a general authority to do a class of acts, the corporation will be liable if he uses that authority to the wrongful injury of third parties.[1] So in this case if the station-master had arrested the plaintiff upon a false charge of travelling without a ticket for himself the liability of the company would have been beyond dispute.

A question has been asked whether a corporation can be held liable for an act essentially *ultra vires*, if express authority to commit it can be clearly shown. The recent decision of a Divisional Court in *Campbell* v. *Paddington Borough Council*[2] seems to answer this question in the affirmative, at any rate so far as courts of first instance are concerned. In that case the Borough Council at a corporate meeting authorized by corporate resolution the erection of a grand stand in the middle of a public highway. By this act, which amounted to a public nuisance, the plaintiff sustained special injury. It was argued for the defence (in reliance on *Poulton's Case*) that the only remedy was

[1] *Bayley* v. *Manchester &c. Railway Co.* (1873) L.R. 7 C.P. 415.

[2] [1911] 1 K.B. 869.

against the members of the Council individually. The passages in which the judges overruled this objection are too short to be very illuminating, but the principle of the decision seems entirely sound. *Poulton's Case* was decided solely on the ground that the authority necessary for the plaintiff's case could not be implied; but where the authority is sufficiently express, what need is there to imply anything? It seems probable, however, that in such cases no authority short of that of the governing body of the corporation could suffice to make the corporation liable.

It has been suggested that in such a case as this the corporators assembled to pass the resolution are themselves merely agents for that purpose, and that we are therefore driven to inquire whether they too are acting within the scope of their authority. But it seems quite clear that in the eye of the law at any rate the resolution is not the act of agents, but the act of the corporation itself. If it were held that the resolution were the act of agents acting *ultra vires* it would obviously be impossible to hold a corporation liable for any tort, however deliberately authorized, since the order to commit a tortious act must of necessity be *ultra vires*.

The act which gives rise to a claim for damages must in all cases be the act of an agent, since the only thing which a corporation can do in its own person is to pass a resolution, and this cannot be

a ground of liability unless and until it has resulted in a wrongful act which causes damage. But the wrongful act must be committed in the scope of the agent's employment, and if we regard the chain of agency as infinite it is obvious that we shall never be able to discover what the original authority really is. Somewhere or other we must be prepared to find an authority which is not derivative but original, and the law finds this original authority in a resolution of the governing body acting through the proper forms. Whether or not this solution can be formulated in purely philosophical or speculative terms is quite immaterial. The problem the lawyer has to face is that of finding a rule which will make corporations liable in tort, since it is obviously desirable as a matter of public policy that they should be made so liable. That being so, it is clear that the only rule of law available for this purpose is that which makes a principal liable for the acts of his agent. It then becomes necessary to determine what is the original or ultimate authority for the acts of the agent; and if this authority is not to be found in the corporate resolution it is not easy to see where it can be found at all.

At the present day it is probably true to say that corporations have been successfully sued for every kind of tort (including those where malice or wrongful intention must be proved) for which an individual could be held liable.

The liability of unincorporate and quasi-corporate bodies has proved a subject of greater difficulty. It has been well settled by the common law, and is now confirmed by statute, that a partnership firm is liable for the torts of its members acting upon the business of the firm.[1] If the tort was committed by a subordinate agent acting under the authority of one of the partners the same principle would of course apply. But beyond this the common law does not seem to have gone in any endeavour to deal with the liability of the unincorporated group.

Now the distinction between corporate and unincorporate bodies is often a legal technicality of the most refined kind. Take for example the case of the ordinary social club, managed by a committee of its own members. In most cases these societies are not incorporated, the club property being vested in the names of a body of trustees. In other cases, however, the club has for reasons of convenience procured technical incorporation under the Companies Acts. To the outer world and for all ordinary purposes the formality makes no practical difference of any consequence. The whole life and government of the society go on exactly as before, and except

[1] Partnership Act, 1890 (53 and 54 Vict. c. 39), s. 10. See also *Hamlyn* v. *Houston & Co.* [1903] 1 K.B. 81. Each partner is also personally liable ; but since he is in any case responsible for all the debts of the firm this makes no practical difference.

in the books of Somerset House there is not even any outward indication of the change that has taken place. If therefore the law holds that the property of the incorporated club is liable, while that of the unincorporated club is not liable, for the torts of the club servants, it will obviously be attaching to the technical distinction a practical result of the utmost importance. It will be granting or denying to the plaintiff a valuable remedy according to the presence or absence of a formality which is only adopted, when it is adopted at all, for minor reasons of convenience. It will be putting a premium on the refusal to obtain public authority, and granting to a group of private individuals the privileges without the responsibilities of corporate existence.

The matter was brought to an issue in the celebrated case of the *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants*.[1] An industrial dispute had arisen between the plaintiff company and their employés, and the defendant trade union (which was registered under the Act of 1876) intervened on behalf of the men. In the course of the dispute some tortious acts were committed by union officials acting within the scope of their employment, and Farwell J. granted an injunction not only against the offending individuals but also against the trade union in its registered name. Upon appeal the name of the

[1] [1901] A.C. 426.

union was struck out of the action, the Court of Appeal holding that there was no legal entity between a corporation and an individual which could be sued in a court of law. But upon final appeal the judgement of Farwell J. was restored, the House of Lords holding that the statutes which invested the unions with certain corporate privileges had thereby impliedly imposed the corresponding corporate liabilities.[1]

This famous decision aroused a vigorous political controversy, and in 1906 the Trades Disputes Act[2] reversed it so far as trade unions were concerned; and the House of Lords has recently held that the exempting section extends to all torts committed on behalf of a trade union, not merely to those committed in furtherance or contemplation of a trade dispute.[3] The statute does not, however, exhaust the principle of the decision. The essence of the judgement is that corporate privileges and corporate responsibilities must always be co-ordinate unless Parliament has decreed the contrary; in so far as any body of men exercise

[1] It has been suggested that the decision is to be explained on the ground that the offending agents are impliedly authorized by all the members individually. If so, the result would be that each member would be personally liable for the whole of the damage caused. But whatever may be said for this view in the abstract it receives no support from the language of the judges in the *Taff Vale Case*. See Professor Geldart in 25 *Harv. L.R.* 584.

[2] 6 Edw. VII, c. 47, s. 4.

[3] *Vacher* v. *London Society of Compositors* [1913] A.C. 107.

powers analogous to those of corporations, so far do they incur the liabilities of corporations for the acts of those whom they employ. 'It cannot matter in the least', said Lord Macnaghten (at p. 438), 'whether persons acting in concert be combined together in a trade union or collected and united in any other form of association.'

This is of course a *dictum* not strictly called for by the bare requirements of the case in debate; but it is valuable as showing that Lord Macnaghten rested his judgement upon broader and firmer ground than the 'implied' construction of the enabling statute. Up to the present time no other case seems to have arisen to give the courts the opportunity of applying the principle of the *Taff Vale Case* to the circumstances of an ordinary voluntary society. In the absence of judicial authority[1] reference may perhaps be made to an

[1] *Elkington* v. *London Association for the Protection of Trade* (1911) 28 T.L.R. 117, seems to have been an action against a voluntary association; judgement was, however, given for the defendants on the ground that the publication in question was not libellous. The only other such case I have been able to find is one of *Brown* v. *Lewis* (1896), very shortly reported in 12 T.L.R. 455. This was framed as a representative action against the committee of a football club for negligence in erecting a stand, whereby the plaintiff was injured. The county court judge amended the claim into one against the members of the committee personally, and this was confirmed by a Divisional Court. But it is at least questionable whether the same course could now be followed in view of the *Taff Vale* decision.

opinion of Sir Edward Clarke's, printed in *The Times* of March 6, 1912. The opinion was called for by the recent outbreaks of wanton damage deliberately inflicted by women acting under the authority of the 'Women's Social and Political Union'; and Sir Edward Clarke takes the view, on the authority of the *Taff Vale Case*, that the property of the society could be made liable in a representative action for the damage so caused.

Whatever view may ultimately commend itself to the courts, the law seems to be in an anomalous condition. If such societies are not liable, then it would seem that the existence of valuable remedies in matters of the utmost importance may turn upon such a pure technicality as the presence or absence of formal incorporation, and the grant of corporateness is thereby made a burden rather than a privilege. If on the other hand they are liable, then it seems difficult to see any rational ground (other than the statute) for the exemption of trade unions. It is, of course, common knowledge that this exemption was granted in 1906 for political reasons with the validity of which this essay is not in any way concerned. But it is undeniable that the law is now in an anomalous state which it is quite impossible to explain on grounds of legal principle. But lawyers may at any rate point out that the responsibility for this rests less with them than with the politicians.

Lastly it remains to consider the position of the

association when it sues as plaintiff in an action of tort

It seems to have been admitted from ancient times that a corporation is entitled to sue when any injury is shown to property or to rights of a proprietary nature. Thus in the Year Books we find a case of a corporation bringing trespass, *quare clausum fregit*.[1] So also we may see a corporation using the action of ejectment with the old fiction of a demise to John Doe.[2] In *Bailiffs of Dunwich* v. *Sturry*[3] we have a case of a corporation entitled to a grant of wreck maintaining an action of trespass for its infringement. If again, as frequently happens, a corporation is patron of a living, it can bring an action of *quare impedit* for interference with its right of presentation.[4]

Difficulty only arises in those cases where the wrong committed is not strictly in the nature of an invasion of proprietary rights. The cases in the books are all concerned with defamation, and the decisions need to be somewhat carefully distinguished.

In *Metropolitan Saloon Omnibus Co.* v. *Hawkins*[5]

[1] Y.B. 7 Hen. VII, 9.

[2] e.g., *Doe d. Mayor &c. of Maldon* v. *Miller* (1818) 1 B. and Ald. 699.

[3] (1831) 1 B. and Ad. 831.

[4] *Chancellor &c. of Cambridge* v. *Norwich* (*Bishop*), (1617) 22 Vin. Abr. 5.

[5] (1859) 4 H. and N. 87.

the plaintiff company was incorporated under the old Joint-Stock Companies Acts. The defendant published a libel charging it with insolvency, dishonesty, and mismanagement of its business. An action was brought, and it was argued for the defence that defamation was an essentially personal wrong which could not be directed against a mere abstract entity such as a corporation. The Court overruled the objection, Pollock C. B. remarking (at p. 90) :

> ' That a corporation at common law can sue in respect of a libel there is no doubt. It would be monstrous if a corporation could maintain no action for slander of title through which they lost a great deal of money. It could not sue in respect of an imputation of murder, or incest, or adultery, because it could not commit those crimes. Nor could it sue in respect of charges of corruption, though the individuals composing it may. But it would be very odd if a corporation had no means of protecting itself against wrong ; and if its property is injured by slander, it has no means of redress except by action.'

This case was cited and approved by a Divisional Court in *Mayor &c. of Manchester* v. *Williams*,[1] where the defendant had written a letter to the local papers alleging that corruption existed ' in two, if not three, departments of our Manchester City Council.' The Court held that these words were not sufficient to found an action by the corporation.

[1] [1891] 1 Q.B. 94.

Lastly we may refer to a case of *South Hetton Coal Co.* v. *North-Eastern News Association*,[1] where the libel consisted in a newspaper article alleging that the cottages provided by the company for its workmen were insanitary and unfit for human habitation. The Court of Appeal held that these charges reflected on the company in the conduct of its business and were therefore actionable at the company's suit.[2]

So much for libels upon bodies corporate. When we turn to consider the position of unincorporated associations we have very little authority to guide us. In an older case of *Williams* v. *Beaumont*[3] the plaintiff was the chairman of an unincorporated assurance company, which was authorized by its private Act of Parliament to sue and be sued in the name of its chairman. The Court held that under this power he could maintain an action for a libel affecting the company in the conduct of its business. It has also been well settled[4] that damages for similar libels upon a partnership may be recovered in an action by the firm. But

[1] [1894] 1 Q.B. 133.

[2] Grant (p. 193) cites two old cases where a corporation has maintained actions or prosecutions against persons libelling its officers in the execution of their duties; but it is very doubtful whether such a doctrine could now be reconciled with the three modern decisions cited above.

[3] (1833) 10 Bing. 260.

[4] See Odgers, *Libel and Slander* (5th ed.), p. 590, and cases there cited.

apart from such cases as these there does not seem to be any clear authority upon libel actions by voluntary associations. On principle it would seem that either damage to property must be shown, in which case the trustees would be able to sue, or the reputation of individuals must be attacked; in the latter case the particular plaintiffs would have to prove that the words complained of were published 'of and concerning' themselves. Thus in a recent Scottish case[1] a newspaper published an article alleging that 'the Roman Catholic authorities of Queenstown' had been guilty of religious persecution. Upon this the Roman Catholic Bishop of Queenstown and the six principal clergy of the place raised an action, alleging that the libel referred to them. The Court of Session held the averments to be relevant, and at the trial verdict and judgement were entered for the pursuers.

[1] *Browne* v. *Thompson & Co.* [1911] S.C. 359.

CHAPTER IV

RIGHTS IN RELATION TO PROPERTY

The law upon this part of our subject is rather complex, and many of the details are to be found in Acts of Parliament dealing elaborately with the various classes of associations. For these the reader must be referred to the special treatises. But even if we confine ourselves to more general rules we shall find important differences, not only between corporate and unincorporate bodies, but between the different classes of corporations.

So far as personalty is concerned the law is fairly simple. Generally speaking both corporate and unincorporate bodies can hold personalty to any extent and subject to no special conditions. In their dealings with it they are of course limited, in the case of corporations by the doctrine of *ultra vires*, and in the case of other bodies by the terms of the contract between the members or the trusts upon which the property is held. Further, in conveying property to an association of any kind care must of course be taken that the property shall necessarily vest within the limits allowed by the 'rule against perpetuities'; that is merely a rule of ordinary law. But provided that the date of vesting conforms to the rule, the mere fact

that the association may hold the property for ever does not invalidate the conveyance. But if any attempt is made to bind the *corpus* of the property by any permanent trust, it will be necessary to consider whether the purpose of the trust is or is not 'charitable'.[1] In the former case the direction will be held binding; in the latter case the gift will be bad as a perpetuity. If money is bequeathed to a charity (whether corporate or unincorporate) with a direction that it be converted into land the direction must be disregarded and the charity takes the money unconditionally.

The part of the law that is complicated all relates to the acquisition and alienation of land. The history of the long struggle by which kings and parliaments have striven to prevent the alienation of land into mortmain is a subject for the historian of real property law, and may be read in many books. The modern law is to be found, partly in the Mortmain Acts of 1888 and 1891, and partly in the numerous statutes, chiefly of the nineteenth century, which were intended to regulate the affairs of particular classes of corporations. Before, however, passing to consider these, we should notice an older rule which occasionally re-asserts itself. The Statute of Uses

[1] The technical meaning of the word 'charitable' is much wider than the popular; for an explanation of this see *Income Tax Commissioners* v. *Pemsel* [1891] A.C. 531, at 583.

(1535) enacted that 'where any *person or persons* . . . shall . . . be seised . . . to the use, confidence, or trust of any other *person or persons or of any body politic*', the legal estate should vest in the *cestui que use*; but it made no reference to the converse case of a body politic being seised to the use of some other person or body politic. This was of course due to the theory, which we find expressed by Coke, that since a corporation has no conscience, it cannot be seised of lands to the use of another, for uses are a matter of conscience. This somewhat fanciful theory is long obsolete, but the distinction in the Statute of Uses is still good law, so far as the later discovery of 'secondary uses' has left it with any practical importance.

Turning now to the modern law we find the general principle laid down in the Act of 1888, that the alienation of land to a corporation works a forfeiture unless the holding of land is authorized by the Crown or by the statute creating the corporation. That is the general rule, but it appears at once that the exceptions outnumber the instances. Companies incorporated under the Companies Acts are exempted by s. 16 (2) of the consolidating Act of 1908, the only restriction being that companies formed for non-mercantile purposes cannot hold more than two acres without the consent of the Board of Trade (s. 19); and since these trading companies form the great majority of modern corporations it will readily be

seen how much the real scope of the rule is narrowed. But this is not the only exception. Municipal corporations are also exempt, since the Acts that govern them confer large powers of acquiring and holding land. The residue left for the rule is thus very small, but even so we have still to exempt the two ancient universities and their colleges, together with the colleges of Eton and Winchester.

About the provisions we have just been considering it should be remembered, first, that they deal only with corporations in the strict sense, and, secondly, that they deal with all acquisition of land by corporations, whether by deed or by will, and quite apart from any question of charity.

The second part of the Act of 1888 deals with assurances of land to charitable uses, and here it becomes immaterial whether the body taking the land is technically incorporate or not. This part of the Act occasioned some harshness in its original form, and for the present law we must look also to the amending Act of 1891. The result comes to this. Assurances *inter vivos* of land to charitable uses must be granted by deed executed before two witnesses. Unless made bona fide for 'full and valuable consideration' they must be executed a year before the settlor's death, and every assurance must within six months be enrolled in the Central Office of the Supreme Court. Furthermore, the interest conveyed must

be in immediate possession, and must contain no power of revocation, life-interest, or other substantial reservation in favour of the grantor. Where the land was devised by will, the earlier Act invalidated the devise altogether; but the Act of 1891 directs that the land shall be sold within a year of the testator's death and the proceeds given to the charity. In this way the land is prevented from coming into mortmain and at the same time no injury is done to the charitable purpose. Certain exceptions to this rule are admitted in cases where small pieces of land are devised for actual occupation by the charity and not as an investment.

Before passing from this part of the subject it is important to notice the technical meaning of the word 'land'. In the Act of 1888 it was defined (s. 10) as 'tenements and hereditaments, corporeal and incorporeal, of whatsoever tenure and any estate and interest in land', a definition which included money lent on mortgage.[1] But this is repealed by an amending definition in the Act of 1891 which reads (s. 3) 'tenements and hereditaments, corporeal or incorporeal, of any tenure, *but not money secured on land or other personal estate arising from or connected with land.*' The practical result appears to be that though you cannot devise land to a charity there is nothing to prevent you devising a rent-charge which

[1] *Re Watts* (1885) 29 Ch.D. 947.

exhausts the full annual value of the property. It has also been held that a reversionary interest does not fall within the Act.[1]

Apart from these restrictions on charitable uses unincorporate bodies are subject to no restrictions in their holding of land. The actual estate must of course be vested in some legal persons. Usually these will be a body of trustees holding as joint tenants, the rules of the association containing provisions for the filling up of vacancies in the body as they occur. At the present day of course there is nothing to prevent a corporation from being a trustee (whether solely or jointly with another person), and it would even be legally possible for all the members to hold the legal estate themselves as joint tenants ; but the practical difficulties of this from the conveyancer's point of view are so great as to be really insuperable.

There are two cases which show us very clearly the distinction which legal theory draws between the tenure of property by corporate and unincorporate bodies respectively. In *Foster and Sons Ltd.* v. *Commissioners of Inland Revenue* [2] a partnership firm transformed its business into a limited liability company. The identity of the members, who were all relatives, remained as before, and the usual form was adopted of a sale by the partners to the new company, the consideration being expressed in fully paid up shares. Upon this

[1] *Re Ryland* [1903] 1 Ch. 467. [2] [1894] 1 Q.B. 516.

transaction the Inland Revenue authorities claimed the duty payable upon a sale, arguing that there had been a transfer of property from certain persons to another 'person'; this person, they said, was quite distinct in law from the vendors, and the fact that the former partners were the only corporators of the new company was irrelevant. Upon the other side it was argued that the sale was purely nominal and that since there had been no real transfer of any beneficial interest no duty was payable. The Court of Appeal (reversing the decision of Cave J.) adopted the view of the Commissioners, the decision involving a clear recognition of the principle that corporators are not in any legal sense the owners of the corporate property.

The other case is that of *Graff* v. *Evans*, decided by Field J. and Huddleston B. in 1881.[1] This was a claim made by the Excise authorities for duty upon a sale of whisky by a club to one of its members. The club was of the ordinary unincorporated kind, the property being vested in trustees for the benefit of the members generally for the time being. The transaction was carried out in the ordinary way through one of the club servants. Upon these facts the Queen's Bench Division held that no duty was payable. There had been no sale, no transfer of property from A to B. The respondent and all the other

[1] 8 Q.B.D. 373; *ante*, p. 56.

members of the club were equitable joint owners of its property, including the whisky in question. The true legal view of the transaction was that all the other members of the club had released their joint interests, leaving the respondent the exclusive owner of the whisky. The club servant who received the money was the agent of all the other members for that purpose.

Here we feel that we have indeed reached a highly rarefied atmosphere of fiction. Contracts, so our books tell us, depend upon a *consensus ad idem*, a meeting of two or more wills; yet here we have a contract to which the great majority of the alleged parties never in point of fact directed their minds at all, nor authorized their agent to make for them, while we may feel fairly certain that those who actually carried it out regarded the transaction as a sale and not as a release. However, so long as we are unwilling to admit a corporate personality *de facto* as well as *de jure*, it would seem that there is no means of escaping from these fictions.

Whether or not corporations have an inherent power of alienating their lands is a question much debated in some of the older books. Kyd, writing in 1793, took the view that they had such a power, but this is denied by Grant (1850). A sentence in the *Sutton's Hospital Case*[1] seems to indicate that Coke took the affirmative view, and there are

[1] (1612) 10 Rep. at p. 30 b.

a few *dicta* scattered through more recent cases, but nothing that is in any way decisive. Of more modern writers Brice [1] supports the negative, while the authors in Lord Halsbury's *Laws of England* [2] maintain the affirmative opinion. At the present day the question is wholly abstract, for any case that can actually arise may always be settled upon other grounds. Where, for example, the property is held upon any trust, alienation in breach of the trust can always be restrained by the court on the ordinary principles of equity, and in addition to this the Charitable Trusts Acts now give to the Charity Commissioners and to the courts a wide control over all possible cases. If the land is held, let us say, by an Oxford college, the answer will be found in the Universities and College Estates Acts,[3] which empower alienation subject to the consent of the Board of Agriculture. So also we will find, *mutatis mutandis*, that the powers of ecclesiastical and municipal corporations to aliene their land are at the present day to be found in special Acts which confer certain powers under certain restrictions. If we turn to railway companies or to

[1] *Doctrine of Ultra Vires* (1893), pp. 62 sqq.

[2] *L.E.* viii, p. 375. (The authors of the title are the late Vice-Chancellor Leigh Clare and Mr. Ramsbotham.)

[3] 21 and 22 Vict. c. 44; 23 and 24 Vict. c. 59; 43 and 44 Vict. c. 46. These Acts were intended to enlarge the powers of alienation, which had been restricted by statute since Elizabeth's time.

modern chartered corporations, we shall always find that in no case has the solution of the problem been left as an exercise in academic learning for the Bench; the question is always dealt with expressly and in advance. In the case of public companies created for special purposes the power of alienation is apt to be somewhat narrowly restricted, and can only be exercised for specified reasons incidental to the main objects of the company.[1] But if the corporation is formed under the Companies Acts the only restrictions on its powers of alienating land will be those (if any) contained in the memorandum of association; and we shall find that the modern company promoter is always careful to draw this document in ample and generous terms.

As for leases, it seems that the common law allowed a corporation to lease its land; but mediaeval legislation from 1285 onwards is much occupied with placing this power, which was often the subject of very serious abuse, under statutory regulation. At the present day the Acts which govern the sale of corporate land invariably deal also with the conditions on which leases may be granted.

Where the property is vested in trustees on behalf of an unincorporate body different considerations will sometimes arise. If the trust is charitable the Charity Commissioners or the court will have the powers which are given them by

[1] *Mulliner* v. *Midland Railway Co.* (1879) 11 Ch.D. 611.

statute or by the older principles of equity. In other cases alienation is generally unrestricted except by the contract between the members of the association and the trusts which embody that contract. If the association is a partnership, the matter is governed by s. 5 of the Partnership Act of 1890. By this section, which is declaratory of the common law, each partner is constituted the agent of the firm and of the other partners for all purposes concerning the partnership business; and this will of course include an authority to deal with the property of the firm, whether real or personal. 'Each partner', said James L.J., 'is the unlimited agent of every other in every matter connected with the partnership business, or which he represents as partnership business, and not being in its nature beyond the scope of the partnership.'[1] This general authority may, of course, be limited to any extent by special agreement between the partners themselves; but in the absence of notice third parties will not be bound by any such unusual limitation. All this is merely the ordinary law of agency.[2]

When an association of any kind comes to be dissolved[3] it may be important to consider whether it is formally corporate or not. In the

[1] *Baird's Case* (1870) L.R. 5 Ch. App. 725, at 733.

[2] If land is held in the names of two or more partners, one of them could only alienate it in pursuance of an authority under seal.

[3] On dissolution generally see Ch. VI.

case of a corporation the property is technically owned by a legal 'person' who is quite distinct from the corporators, and the corporators have as such no beneficial interest in the property.[1] Consequently we find that 'the effect of dissolution in the first way is, that the lands and real property of the corporation revert to the donors or their heirs, and the franchises become revested in the Crown; and there is no means of reviving the old corporation by a new charter. The corporation has wholly gone, and with it are also lost and avoided all its claims, debts, and liabilities of all kinds. . . . The personal estate of a dissolved corporation seems to vest in the Crown as *bona vacantia*.'[2]

Where, however, the property is held, as is often the case with common law corporations, upon trust for some charitable purpose, the dissolution of the corporation will not be suffered to defeat the purposes of the trust; and in this case the court would exercise its discretionary powers to ensure that the money was applied to the same objects, or at least to some analogous scheme according to the doctrine of *cy-près*.

In the case of an unincorporate association, on

[1] All this must of course be read subject to statutory exceptions; thus the shareholders of a limited company in liquidation are entitled to divide the assets after the claims of creditors have been satisfied.

[2] Grant, p. 303.

the other hand, the members existing at the date of dissolution are *prima facie* the only persons interested in the common property; and it was upon this principle that the great wealth of Serjeants' Inn was divided among those judges and barristers who were fortunate enough to be its last members at its dissolution in 1877.[1] If, however, the court can find an indication of any charitable trust, the enforcement of the trust is of course paramount to any rights of individuals; and it was upon this principle that Mr. Justice Cozens-Hardy and the Court of Appeal saved the property of Clifford's Inn for the purposes of legal education in 1902.[2]

One or two minor points remain to be disposed of. The property of associations is now subject to various forms of taxation. All taxation is of course purely a matter of statute, and the courts are therefore not called upon to determine the questions that arise upon any general principles of law. For our purposes it is sufficient here to notice that the statutes do not, generally speaking, draw any distinction in this matter between corporate and unincorporate bodies.[3] It may, of course, be very difficult, especially in the case of

[1] See *The Times* of April 10, 1902.

[2] *Smith* v. *Kerr* [1902] 1 Ch. 774.

[3] See *Curtis* v. *Old Monkland Conservative Association* [1906] A.C. 86, for a point arising upon the Income Tax Act of 1842.

a non-trading association, to define clearly what is meant by 'income'; but the solution of such problems obviously lies beyond the scope of the present inquiry.[1]

With regard to incorporeal hereditaments, these fall within the provision of the Mortmain Acts, and may be owned by corporations subject to the conditions therein contained. Easements and other appurtenant rights of course follow the fortunes of the land to which they are appurtenant, and it is quite immaterial whether such land is owned by an individual or by a body corporate. The ownership of non-appurtenant rights by corporations is less common; but a number of advowsons are in corporate hands, and occasionally it happens that a corporation holds a *profit à prendre* in gross upon trust to permit the actual exercise of the right by its own members or even by strangers. In one reported case the sole property of an ancient prescriptive corporation consisted of fishery rights held upon such a trust.[2]

In this connexion the case of unincorporated bodies does not seem to call for any special treatment: but it is worth noting that in some cases corporate ownership may be the sole method by which rights claimed on behalf of the general

[1] For an interesting recent instance see *Carlisle and Silloth Golf Club* v. *Smith* [1913] 3 K.B. 75.

[2] *Re The Free Fishermen of Faversham* (1887) 36 Ch.D. 329.

public can be maintained. Rights of way, common, fishery, and so forth are, in the eye of English law, pieces of property, and therefore can only be owned by definite 'persons' recognized by law. Unorganized bodies, such as the general public or the inhabitants of a particular village, have no such recognized personality, and therefore cannot lay claim to or defend such rights.[1] But a corporation can be the legal owner of such rights and hold them upon trust for the enjoyment of persons who are not incorporated. Sometimes the court will even presume a lost grant to an existing corporation in order to avoid the necessity of pronouncing an ancient usage to be unlawful or merely precarious;[2] but if there is nothing in the case to warrant such an assumption the mere antiquity of the user will of itself avail nothing. In the well-known recent case of the Wye fisheries a peaceful and open user of at least three centuries was clearly proved, but notwithstanding this a majority of the House of Lords held that the fishermen could claim no rights as against the owners of the soil.[3]

Strictly speaking a corporation cannot be a legal tenant of copyhold lands, the reason being that

[1] Of course public rights of way are known to the law, but these proceed upon a different principle, and are not a matter of property law.

[2] *Goodman* v. *Mayor &c. of Saltash* (1882) 7 A.C. 633.

[3] *Harris* v. *Chesterfield (Earl)* [1911] A.C. 623.

its immortal character would cheat the lord out of his fines and other customary dues.[1] In practice the technical difficulty has been surmounted by vesting the legal estate in a natural person as trustee, upon whose death or forfeiture the fines would become payable. By a curious custom, formed on the analogy of copyhold tenure, a fine is paid by Magdalen College, Oxford, to Merton College upon the death of each President of Magdalen; and a similar custom is said to be still observed in a few other cases.

It is now well settled that a corporation can take probate of a will, but cannot act as executor.[2] If a corporation is named as executor, it must nominate a 'syndic' (usually a director or other superior officer) to perform the duties; but the guarantee of the corporation, if it is financially sound, will be accepted by the court as sufficient security by itself.[3]

[1] *Att.-Gen.* v. *Lewin* (1837) 1 Coop. Ch. Cas., at 54.

[2] *Re Darke* (1859) 1 Sw. and Tr. 516. The reason of course is that it cannot take the necessary oath. So also in the canon law we find Pope Eugenius III directing that the *iuramentum calumniae* shall in the case of a monastery be taken by the *oeconomus* (X, ii, 7, 4).

[3] *Re Hunt* [1896] P. 288.

CHAPTER V

CRIMINAL LIABILITY

In order to fix corporations with any form of legal liability two things are logically necessary. In the first place, since corporations can only act through agents, the liability must be one which would attach to a natural man for an act done by his agent. Secondly it must be clear that the liability is one which, in the case of natural persons, attaches quite independently of wrongful intention or other moral guilt in the principal; otherwise we are faced with the difficulty of attributing moral states to an artificial person and thereby led on to treacherous and uncertain ground which, however attractive to the philosopher, is far too dangerous for the prudent lawyer.

Now we have seen that in the law of torts the English system has adopted a severe rule of vicarious liability which holds a principal responsible for all wrongs committed by his agents acting within the scope of his employment, without considering whether or not any blame attaches in the particular case to the principal himself. The result has been that we have found it possible to apply the law of agency to the acts of corporations so far as to make their civil liability

co-extensive with that of individuals. When the principle adopted is that of insurance there is obviously no reason for restricting its application to the case of property held by natural men. The reasons of public policy which have given us the rule do not allow us to draw a distinction in favour of exempting corporate funds from its operation.

When we come to deal with the question of criminal liability we find that this simple solution is not available. Generally speaking, a man cannot be criminally punished for the acts of his servants merely on the ground that they were committed in the course of the employment. The liability is of a strictly personal kind, and some degree of personal participation or at least acquiescence in the criminal act must be shown before a conviction can be obtained. This was well settled as long ago as 1730 in a case of *Rex* v. *Huggins*,[1] where the warden of the Fleet Prison was indicted for the murder of a prisoner who had been killed by confinement in an unhealthy cell. At the time in question the prison was in the charge of a deputy appointed by the warden, and the warden was taking no direct part in the management of the place. Upon these facts the Court of King's Bench held that a verdict of murder could not be sustained. 'He shall answer as superior for his deputy civilly,' said Raymond C.J., 'but not criminally.... He only is criminally

[1] 2 Ld. Raym. 1574.

punishable who immediately does the act or permits it to be done. So that if an act be done by an under-officer, unless it is done by the command or direction, or with the consent of the principal, the principal is not criminally punishable for it.'

The result of this doctrine is that, generally speaking, criminal liability cannot be brought home to a body corporate. Blackstone, indeed, following Coke,[1] tells us without qualification that 'a corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may, in their distinct individual capacities.'[2] The greater part of the paragraph in which this sentence occurs is totally untrue as a statement of the existing English law. But in what Blackstone says of criminal liability he is still substantially right except for certain very limited qualifications which have been grafted on to the rule by decisions in the course of the last century. These exceptions it will now be our business to consider in the light of particular cases.

Until the beginning of the nineteenth century no exception seems to have been admitted to the general rule that a corporation cannot be made the subject of an indictment. In 1734 we find it expressly decided by Lord Chancellor Talbot (though not actually in criminal proceedings) that

[1] 10 Rep. 32. [2] i. 476.

a corporation is not liable to be prosecuted for perjury.[1] The first instance of an indictment being successfully brought against a corporation seems to have been in 1811, when the corporation of Stratford-on-Avon was prosecuted for failure to repair a bridge.[2] In this case the objection that a corporation was incapable of indictment does not seem to have been taken.

More important is the case of *Reg.* v. *Birmingham and Gloucester Railway Co.*, in 1842, where the question was explicitly raised.[3] The indictment was brought against the company for their failure to build certain arches in compliance with their statutory duties. The objection was taken that an indictment could not be brought against a corporation, counsel for the defence relying partly on procedural difficulties and partly on certain *dicta* in various old cases. The Court, however, held the indictment good, thus establishing the rule that a corporation could be indicted for a non-feasance or negative failure to perform a statutory duty.

In 1846 the process was carried a step further. An indictment was framed against the Great Northern Railway for creating an obstruction in the highway.[4] Here the defence attempted to

[1] *Wych* v. *Meal* (1734) 3 P. Wms. 310.

[2] (1811) 14 East, 348. Kyd (i. 255) had suggested in 1793 that such an indictment might be brought.

[3] (1842) 3 Q.B. 223.

[4] (1846) 9 Q.B. 315.

draw a distinction between 'non-feasance and 'misfeasance', arguing that an indictment would not lie for active wrong-doing. Lord Denman, however, pointed out that no such distinction could be logically drawn.

'Many occurrences', he said, 'may be easily conceived, full of annoyance and danger to the public, and involving blame in some individual or some corporation, of which the most acute person could not clearly define the cause, or ascribe them with more correctness to mere negligence in providing safeguards, or to an act rendered improper by nothing but the want of safeguards. If A is authorized to make a bridge with parapets, but makes it without them, does the offence consist in the construction of the unsecured bridge, or in the neglect to secure it?'

The chief difficulty in modern times has been to determine the exact limits of this admitted liability. Every one is agreed that corporations cannot be prosecuted for murder and burglary and many other crimes; but it is not always easy to draw with accuracy the exact line which separates such offences from those where criminal liability is admittedly incurred. The cases that help us are not numerous.

In *Hawke* v. *Hulton and Co., Ltd.*[1] the defendant company was the proprietor of a newspaper and was summoned for an infringement of the Lotteries Act of 1823. The section under which the prosecution was instituted said that persons holding

[1] [1909] 2 K.B. 93.

lotteries might be convicted as 'rogues and vagabonds', the penalties for which were imprisonment and whipping. By a later statute the alternative of a fine was provided. The Court held that it was impossible to convict a corporation of being a rogue and a vagabond, but suggested (without deciding) that it might be possible to proceed under another section of the original statute which provided for the infliction of pecuniary penalties.

The next case that we have to consider is that of *Pearks, Gunstone, and Tee, Ltd.* v. *Ward*.[1] This was a prosecution instituted for an offence against one of the statutes designed to protect the purity of the food supply. The magistrate proposed to dismiss the case on the ground of the impossibility of attributing a *mens rea* to a corporation, but the Divisional Court sent the case back with a direction to convict. The case is interesting for a careful exposition by Channell J. of the proper method of handling such difficulties :

'By the general principles of the criminal law,' he said, 'if a matter is made a criminal offence, it is essential that there should be something in the nature of *mens rea*, and, therefore, in ordinary cases a corporation cannot be guilty of a criminal offence, nor can the master be liable criminally for the offences committed by his servant. But there are exceptions to this rule in the case of quasi-criminal offences, as they may be termed, where

[1] [1902] 2 K.B. 1.

certain acts are forbidden by law under a penalty, possibly even under a personal penalty, such as imprisonment, at any rate in default of payment of a fine ; and the reason for this is, that the Legislature has thought it so important to prevent this particular act from being committed that it absolutely forbids it to be done ; and if it is done the offender is liable to a penalty whether he had any *mens rea* or not, and whether or not he intended to commit the breach of the law. When the act is of this character then the master, who, in fact, has done the forbidden thing through his servant, is responsible and is liable to a penalty. There is no reason why he should not be, because the very object of the Legislature was to forbid the act absolutely. It seems to me that exactly the same principle applies in the case of a Corporation.

This language was cited with approval in a later case of *Chuter* v. *Freeth and Pocock Ltd.*,[1] where the defendant company was summoned for adulterating milk. The statute in this case provided that a defendant was entitled to acquittal if he could prove innocent intention, but notwithstanding this the conviction was upheld.

'In my view this is too narrow a construction,' said Lord Alverstone C.J., referring to the argument for the defence. 'Where a person is capable of giving a warranty, that person is liable to a penalty if he gives a false warranty. There is no reason why a warranty should not be given by a corporation. It can give a warranty through its agents, and through its agents it can believe or not believe, as the case may be, that the statements in the warranty are true.'

[1] [1911] 2 K.B. 832.

Perhaps the best statement of the rule is to be found in the opinion of an American judge:[1]

'When a statute in general terms prohibits the doing of an act which can be performed by a corporation, and does not expressly exempt corporations from its provisions, there is no reason why such statute should be construed as not applying to them, when the punishment provided for its infraction is one that can be inflicted on a corporation,—as, for instance, a fine. . . . If the law were capable of the construction contended for by the defendant, the result would be that a corporation, in contracting for the doing of any public work, would be given a privilege denied to natural persons.'

But it is possible that the opportunities of development in this direction have not yet been fully exhausted.

It sometimes happens that statutes enjoin the performance of some particular act by a corporation and at the same time expressly direct that the corporation itself shall be liable for the money penalty entailed by non-compliance. The Court of Appeal has held that in such cases the proceedings are of a criminal character and therefore do not admit of the appeals that are competent in civil suits; this was decided upon the provision in the Companies Act which compels companies

[1] De Haven J. in *United States* v. *John Kelso Co.* (1898) 86 Fed. Rep. 304. The case was one in which the company had violated a statute regulating the conditions of labour in factories.

under threat of a penalty to make certain returns to Somerset House.[1]

Up to the present time no attempt has been made to fix unincorporate associations with any form of criminal liability, and as the law now stands it is not easy to see how this step could be taken without the help of Parliament. The statutes regulating friendly societies and other quasi-corporations contain a number of criminal provisions, but these seem to be invariably enforced by penalties against the officers and members of such bodies, and not by fines to be paid out of the common funds. It is true that proceedings have been frequently taken against partnerships for infringement of statutory duties, and the technical objection does not ever seem to have been raised; but the point would be merely academic in such a case, since partners are in any event individually liable for the whole debts of the firm.

In *Newman* v. *Jones* [2] the trustees of a working men's club were summoned for an infringement of the licensing laws, a club servant having sold liquor to a non-member. The magistrate convicted the defendants individually, and ordered

[1] *Reg.* v. *Tyler and The International Co., Ltd.* [1891] 2 Q.B. 588. See also *Lawler* v. *P. and H. Egan, Ltd.* [1901] 2 Ir.R. 589. Mr. Carr (p. 97) cites some interesting American and Canadian cases in which it has been sought to fix corporations with a still wider criminal liability.

[2] (1886) 17 Q.B.D. 132.

them to pay fines with the alternative of imprisonment. Upon appeal the conviction was quashed on the ground that the servant was acting in defiance of express orders. From this it seems that in the absence of such orders the conviction might have been sustained, the trustees (or possibly the committee)[1] being simply treated as if they were the proprietors of a shop; for it is settled that in such cases as these the proprietor of a shop is criminally liable for the misconduct of his servant unless it was the result of disobedience to express orders.[2] No one seems to have suggested that a prosecution could be instituted with the object of recovering a penalty out of the common property of the club.

In this connexion reference may be made to an unreported case of *Rex* v. *Owners and Occupiers of Ground called Burn in the Parish of Easingwold*.[3] This was an attempt to indict the persons so described for failure to carry out some repairs. The indictment was set aside on the ground that definite persons must be named as defendants. It seems certain that any attempt to prosecute criminally the members of a club or any other voluntary society by a general description would

[1] The Court refused to decide who were the actual employers.

[2] *Brown* v. *Foot* (1892) 61 L.J.M.C. 110.

[3] Hilary Term, 1778; cited *arguendo* in *Reg.* v. *Birmingham and Gloucester Railway Co.*, 3 Q.B., at 226.

be open to a similar objection. The principle that in all criminal proceedings definite legal persons, whether natural or artificial, must be named as defendants is now too well settled to be shaken by any authority short of Parliament.[1]

[1] The only exception to this rule seems to be the case where the 'inhabitants' of a parish or other district are indicted for failure to repair a highway. There is no need to mention names in such an indictment, and any two or more of the inhabitants may appear; in default of appearance any two of them may be arrested. Provided the highway is repaired within a certain time only a nominal fine is usually imposed, but any fine may always be levied by *distringas* upon any of the inhabitants individually. In practice the repairs are then usually carried out by the local highway authority, but if an individual does carry out the repairs he is entitled to recover the cost from the authority. For a fuller explanation of this procedure the various special treatises on the subject should be consulted. The case last cited serves to show that this exception is confined within strict limits.

CHAPTER VI

DISSOLUTION

GENERALLY speaking there is no reason why a corporation should not last as long as the State from whose laws it derives its being ; and for such an immortality as this the normal corporation is usually designed. Formerly it was said that even the Crown had no power at common law to incorporate by charter for a limited period of time. This does not seem to have been altogether clearly settled, for in 1600 the first charter of the East India Company professed to incorporate that body for fifteen years only ;[1] but when in 1694 it was desired to incorporate the new Bank of England for a limited period it was deemed necessary to invoke the authority of Parliament for the innovation. At present the question is of no more than antiquarian interest, since the Crown is now empowered by statute to grant charters limited to any term or number of years or to any period whatever.[2] Nor is there anything to prevent the

[1] The second charter of 1609 made the Company perpetual, subject to determination at three years' notice upon proof of injury to the State. See Ilbert, *Government of India* (2nd ed.), p. 13.

[2] 1 Vict. c. 73.

promoters of an ordinary limited company incorporated under the Act of 1908 from providing for its dissolution upon some specified contingency.

Such powers are, however, but rarely exercised, and generally the law treats the dissolution of a corporation as an abnormal and unexpected event, not within the contemplation of the original founders. When it does happen it may come either from without or from within.

In the common case of an ordinary trading company the procedure is of course fully regulated by statute, and must be studied in books dealing specially with company law. The dissolution of such a company is called a 'winding-up', and may be either compulsory or voluntary. A compulsory winding-up usually represents an attack upon the company by dissatisfied creditors. The voluntary procedure is frequently resorted to by the directors in order to carry out some scheme of reconstruction which shall settle the affairs of the company upon a more satisfactory basis. It has been held that the winding-up procedure is not available in the case of a prescriptive corporation which possessed no property of a realizable nature.[1]

In the case of a common law corporation proceedings from without for its dissolution are generally of a punitive nature. The Crown has no prerogative power at common law to revoke or

[1] *Re The Free Fishermen of Faversham* (1887) 36 Ch. D. 329.

alter its own charters without the consent of the body thereby affected, but a corporation that misconducts itself can be attacked in the courts by the procedure known as *scire facias*. This writ may be granted for various reasons. In some cases, after a charter has been granted, facts may come to light which show that the grant was originally obtained by fraud. Or again it may be proved that the corporation has been violating some of the conditions of its existence as laid down in the charter. In either case the Crown is entitled to claim through the Attorney-General that the charter be delivered up for cancellation and the corporation brought to an end, its liberties being seised into the hands of the Crown. It is also possible, though this cannot be laid down with any certainty, that the writ is available in any case where the conduct of a corporation can be shown to be gravely prejudicial to the public interest, even though no formal violation of the terms of the charter can be proved.

Where it is not desired to destroy the corporation altogether, but merely to punish it for an abuse of its privileges, the milder procedure of *quo warranto* may be adopted and a judgement obtained by which the liberties of the corporation are seised into the hands of the Crown. The effect of this judgement is not to dissolve the body, but to suspend its active existence during the pleasure of the Crown.

Where a charter has been obtained by fraud the judgement annulling it cannot be limited to the immediate effects of the fraud, since this would result in creating a corporation different from that which the Crown intended. The charter must therefore be cancelled *in toto*.[1]

The procedure by *quo warranto* is also available in cases where a body of persons has been assuming wrongfully to act as a corporation. In this case the Attorney-General demands to know ' by what warrant ' they claim to behave as they do. If the persons thus challenged can make good their claim either by a charter or by long prescription, well and good. Otherwise judgement will be given to the effect that the liberties which they have been assuming are seised into the hands of the Crown ; and a fine may or may not be inflicted on the individuals who have been thus misconducting themselves.

It may be remarked in passing that instances of these processes being actually put in motion are very rare in the circumstances of the present time.

If a common law corporation wishes to be dissolved by a voluntary act the proper course is for it to surrender its charter into the hands of the Crown. In practice this is very rarely done with

[1] *La Banque d'Hochelaga* v. *Murray* (1890) 15 A.C. 414 ; this case was decided upon the Quebec Code, but the principle of the decision, as explained at pp. 426–7, is of general application.

a view to the total dissolution of the body, but instances are fairly common of old charters being surrendered in exchange for fresh ones with the object of reconstituting the society upon a new basis.[1] Generally a formal act of the governing body is sufficient to effect this purpose, provided that the intention to surrender be perfectly clear; but where the corporators have as individuals proprietary interests in the corporate property the surrender cannot be effected without their individual consent.[2]

It is also possible for a corporation to perish by mere disintegration or decay. It may simply die out owing to the gradual loss of all its members, if no arrangements have been made for continuing the succession. Or again a corporation may consist of two or more essential parts, and one of these may be lost beyond recovery.

'If there be a corporation having a head,' says Grant (p. 303), 'who by the constitution is to be annually elected on a certain fixed day, and they neglect or omit to elect a head on the proper day, such a corporation is virtually dead, or at least dormant; for in the vacancy of the head, such a corporation, as we have seen, can do no corporate act; and in such a situation, they can only be renovated or restored by a fresh charter, or by an Act of Parliament.'

This doctrine has been pressed to the extent of

[1] See above, Ch. I. In this case the continuity of the body is not interrupted.

[2] *Ward* v. *Society of Attornies* (1844) 1 Coll. 370.

holding that in such circumstances the corporation cannot even acquire the title to any property, with the result that it is impossible for the head to bequeath property to the body by his will. There are no modern instances of this curious rule being actually enforced; but in 1863 Dr. Whewell, the Master of Trinity College, Cambridge, wishing to leave a sum of money to his own college, thought it prudent to frame an elaborate trust providing that the fund should not actually vest in the college until the election of a new Master. It is, however, possible that at the present day all these precautions are unnecessary, since the Land Transfer Act of 1897 [1] now provides that all the property of a deceased person shall vest in the first instance in his legal personal representatives in trust for those who are beneficially entitled; and there seems no reason why the old rule should apply to anything but the acquisition of a legal interest. As a matter of modern practice colleges and similar bodies habitually transact business during a vacancy of the headship, and it is possible that their modern reconstruction on a statutory basis may have silently taken away whatever of life there was in the old technicality.

The possibility of a corporation continuing to live on in a dormant state when its active existence has been suspended is well illustrated by the case

[1] 60 and 61 Vict. c. 65, s. 1.

of *Mayor &c. of Colchester* v. *Brooke*.[1] In that case the corporation had received a charter from Richard I which included among other privileges a grant of fishery. In 1745 judgement of ouster was given against all the existing members of the body, and no mayor or aldermen were appointed until 1763, when a new charter was given, professing to confirm all the former rights. The Court held that there had been no dissolution of the corporation but that the old body, which had become dormant, was revived and could lay claim to the privilege in question.

The dissolution of unincorporate societies is effected by the mutual consent of their members. This is all governed by the ordinary principles of contract law, with the result that in the absence of any provision to the contrary the consent must be unanimous. If one-tenth of the members oppose the dissolution and the majority nevertheless insist upon forcing the matter through, the only legal effect of the proceeding is that they have as individuals resigned their membership of the society and their interest in its property. The dissentient minority then form the whole society and are the only persons lawfully interested in its possessions. For an illustration of this we may refer again to the *Free Church Case*.[2] What the majority there purported to do was to dissolve

[1] (1846) 7 Q.B. 339.

[2] See above, pp. 39–48.

the existing Free Church and to make over its property to a new composite body to be known as the 'United Free Church'. A few passages from the judgement of Lord Robertson will make this clear:[1]

'The Church thus set up [*i.e.* in 1843] was endowed, by the liberality of its members, with the property in dispute. Two competitors now claim it. Of the Respondents, the first remark to be made goes to the very root of their claim. They are not, either in name or composition, the Free Church of Scotland. They are not even the majority of the Free Church, but the assignees of the majority of the Free Church; they are a body formed in 1900 by the fusion of the majority of the Free Church with another body of Presbyterian Dissenters, the United Presbyterian Church. The property of the Free Church is claimed by this composite body, which, to the extent of a third or some large proportion (for the particulars are not before us and are unimportant), is composed of United Presbyterians. Of this new body it may be affirmed, nearly as truly, that it is United Presbyterian as that it is Free Church, and its name—the "United Free Church"—suggests the fact. . . . The change of name and the fact of fusion put it on the Respondents to prove their identity with the original beneficiaries. . . .

'While such is the name and such the composition of the Respondents' body, the position of the other competitor, the Appellants, is very much simpler. They are those ministers and laity of the Free Church who did not concur in the union of 1900, but protested against it; they have done nothing but remain where they were, holding to the letter all the doctrines of the Free Church, adhering to it as an institute, and continuing its existence

[1] Orr's report, pp. 591 *seqq.*

according to the measure of their powers. They say that in the event which has happened they are the Free Church—their brethren having left them for this new Church—just as those brethren might have left them for the Establishment or the Episcopalians. They have, however, been declared by the Respondents no longer to be of their communion, and their manses and churches have been formally claimed by the Respondents for their own exclusive use. . . . For let it not be forgotten that the contention of the Respondents necessarily involves that the majority is entitled not merely themselves to retain the property but also (1) to introduce the United Presbyterians as beneficiaries, and (2) to oust the dissentient minority from the benefits of the foundation.'

Such being the state of the law upon this subject it is not surprising to find that most well-drafted sets of club rules contain provisions enabling the society to be dissolved by the vote of a certain majority. In such a case, provided that the prescribed procedure is duly followed, a dissentient minority cannot legally object to the dissolution being carried out.

It remains to consider what happens when an association of any kind is effectively dissolved.

As far as commercial companies are concerned, the matter is fully provided for by the Act of 1908. Shortly stated, it comes to this, that the claims of creditors must first be satisfied, and the remaining assets, if any, are divided among the shareholders in proportion to the value of their interests. Debenture-holders rank before unsecured creditors, even when, as is often the case,

the debenture-holders are themselves largely interested in the shares.[1]

But in the case of a common law corporation the corporators have, in the absence of express provision, no individual interests whatever in the common property. They can neither claim its assets nor be liable for its debts. The property, if there is any, is derelict, and so much of it as consists of pure personalty vests in the Crown as *bona vacantia*. But real or leasehold estate is treated differently. The theory in this case is that the land is granted to the corporation during its existence, or during a term of years if it shall so long live. Consequently, if a dissolved corporation was possessed of freehold land, the land returns to the donor or his heirs ; if the land was held for a term of years which is not yet expired, the landlord's reversion is accelerated. In either case there is no property left without an owner to be picked up by the Crown. So it has been held that a surety who had guaranteed the payment of rent due from a corporation was no longer liable after its dissolution, since the lease was then at an end.[2] On the other hand, a personal chattel or chose in action held upon trust for a deceased corporation must be held upon trust for the Crown.[3]

[1] *Salomon* v. *Salomon & Co., Ltd.* [1897] A.C. 22 ; see above, pp. 53–55.

[2] *Mayor &c. of Hastings* v. *Letton* [1908] 1 K.B. 338.

[3] *Re Higginson & Deans* [1899] 1 Q.B. 325.

In the absence of express provision to the contrary the liabilities of a corporation perish with it, and its creditors have no recourse against its property. Conversely all debts owing to the corporation are discharged.[1] The Crown cannot recover them, since it does not derive title from the corporation, but merely gathers up its goods as *bona vacantia*. So too a church appropriated to the corporation becomes *ipso facto* disappropriate,[2] while rent-charges and annuities payable to it similarly disappear.[3]

The property of an unincorporate society is, as we have seen, deemed to belong to all the existing members as joint-tenants. From this it follows that in the event of a dissolution it will be divided among the members then existing in equal shares. We have already had occasion to notice the case of Serjeants' Inn, the great wealth of which was thus divided among its surviving members upon the dissolution of the society in 1877.[4] Any such distribution must of course be subject to the

[1] It is not quite certain how far this is now true in view of *Re Higginson & Deans*, but a passage in the judgement of the Court (at p. 333) seems to indicate that a mere contractual right, when no steps had been taken to realize it, would be discharged.

[2] *Grendon* v. *Lincoln* (*Bishop*), (1577) Plowd. Com. 501.

[3] Vin. Abr. *Rent*, B.b. pl. 4; Y.B. 20 Hen. VI, f. 7, pl. 17.

[4] See above, p. 91; for another instance see *Re Printers', and Transferrers', Amalgamated Trades Protection Society* [1899] 2 Ch. 184, where the amount was divided among the existing members in proportion to their contributions.

rights of creditors; but the creditors are only entitled to look to the funds of the society which are actually in hand, and individual members, whether past or present, cannot be made liable except by some voluntary act of their own.[1]

Different considerations prevail where the society holds its funds or any part of them upon trust for some purpose that falls within the wide legal definition of what is 'charitable'.[2] In this case the court will not suffer the trust to fail for want of a trustee, nor will the members be allowed to pocket the money for themselves. The court will see to it that the trust is carried out either according to its terms, or, if that proves to be impracticable, as nearly as possible, upon the well-known equitable principle of *cy-près*. In some cases Parliament has also prescribed a similar course. Thus by the Literary and Scientific Institutions Act[3] of 1854 the property of any institution that comes within the scope of the Act cannot be divided among the members existing at the date of dissolution, but must be applied so far as possible to the same purposes as before.

The case of a partnership stands by itself. The continuing consent of *all* the members is of the very essence of such an institution, and it there-

[1] *Wise* v. *Perpetual Trustee Co.* [1903] A.C. 139.

[2] For an authoritative explanation of this see *Income Tax Commissioners* v. *Pemsel* [1891] A.C. 531.

[3] 17 and 18 Vict. c. 112, s. 30.

fore follows that any member can (in the absence of express agreement to the contrary) dissolve the firm at any time. If the remaining partners choose to carry on the business a new partnership is thereby formed. A dissolution is also effected by the death or bankruptcy of any partner, and it may also in certain cases be decreed by the court. Upon a dissolution the claims of any outside creditors must be satisfied in priority to any settlement of accounts between the members of the firm.[1]

[1] See the Partnership Act, 1889, ss. 32–9, and the special treatises on the Act.

CHAPTER VII

THE CONFLICT OF LAWS

STORY, writing his *Commentaries on the Conflict of Laws* in 1834, dismisses the case of corporations in a single sentence.[1] But since his day we have seen the great development of trading companies with world-wide operations, and problems which to him were non-existent have produced more than one difficulty for our modern judges.

Perhaps the first of these problems is to arrive at some test for determining what is the domicile of a corporation. Upon this question there seems to be some divergence between the views taken by our two leading modern text-writers. The late Dr. Westlake held that an artificial person was domiciled in the country of its incorporation.

'The regulation of any artificial person', he says, 'in matters concerning only itself or the relations of its members, if any, to it and to one another, must depend on the law from which it derives its existence. That law is its personal law, or in other words it is domiciled in the country of that law.'[2]

Professor Dicey, on the other hand, lays down the following rule for determining the question of domicile:

'The domicile of a corporation is the place considered by law to be the centre of its affairs, which (1) in the

[1] § 585. [2] 5th ed., p. 387.

case of a trading corporation, is its principal place of business, *i.e.* the place where the administrative business of the corporation is carried on; (2) in the case of any other corporation, is the place where its functions are discharged.'[1]

In support of both positions two cases[2] are cited in which it was held that insurance companies registered in Scotland and having their chief offices in Edinburgh, but carrying on a large business through branch offices in England, could not be served with a writ out of the jurisdiction. Nothing more was therefore involved in these decisions than a technicality of procedure under the Rules of Court, and more light can be thrown upon the larger question by such a case as that of *De Beers Consolidated Mines Ltd.* v. *Howe*.[3] In this case the company was incorporated under the Transvaal law, and its principal object was the conduct of diamond mining in South Africa. The Court, however, found as a fact that the principal control of the company was exercised from London, and upon this ground decided that it was liable to be assessed for English income-tax upon the whole of its profits, as a company 'resident' in England.

This case seems, therefore, to be an authority

[1] 2nd ed., p. 160.

[2] *Jones* v. *Scottish Accident Insurance Co.* (1886) 17 Q.B.D. 421; *Watkins* v. *Scottish Imperial Insurance Co.* (1889) 23 Q.B.D. 285.

[3] [1906] A.C. 455.

for Professor Dicey's rather than for Dr. Westlake's definition of the test of domicile. But it should be noted that both the Lord Chancellor and the Master of the Rolls expressly pointed out that the principle which they were applying must not be taken to cover the question of the service of a writ.

Nor can the principle of the *De Beers Case* be extended to cover questions of capacity. In the case of natural persons questions of contractual or other capacity are generally referred to the law of the domicile.[1] But it is well settled in the case of corporations that, since they derive their whole existence from some positive law, their capacity cannot exceed whatever powers may have been conferred upon them by that law. If, therefore, we follow Professor Dicey in holding that the principal place of business marks the domicile, we must be careful to note that the legal consequences of domicile differ in the case of corporations from the consequences in the case of individuals; or, as Professor Dicey himself points out (p. 162):

'A corporation may very well be considered domiciled, or resident, in a country, for one purpose and not for another, and hence too the great uncertainty as to the facts which determine the domicile, or residence, of a corporation. In each case the principal question is

[1] See, for example, *Sottomayor* v. *De Barros* (1877) 3 P.D. 1, at 5; *Udny* v. *Udny* (1869) L.R. 1 Sc. and D. 441, at 457. It is not altogether settled to what extent mercantile contracts are an exception to the rule; *Cooper* v. *Cooper* (1888) 13 A.C 88, at 108. On the matter generally see Dicey, pp. 534 *seqq.*

not, at bottom, whether the corporation has, in reality, a residence in a particular country, but whether, for certain purposes (*e.g.* submission to the jurisdiction of the courts or liability to taxation), a corporation is to be considered as resident in England or in some other country.'

With regard to the question of taxation one or two further points may be noticed. In the first place, a company registered and managed in the United Kingdom is subject to the British income-tax upon the whole of its profits no matter where the business of the company may be carried on.[1] If it carries on its business abroad by controlling other companies it will be liable to taxation upon their profits only in so far as they can, upon the facts of the particular case, be regarded as the mere agents of the home company ; and the fact that the home company holds the majority of the shares in the foreign company is not of itself sufficient to establish this conclusion.[2] On the other hand, a company incorporated abroad, and having its principal place of business abroad, cannot be assessed for British income-tax except upon the profits arising out of business actually conducted within this country.[3]

It is of course matter of common knowledge

[1] *Cesena Sulphur Co. Ltd.* v. *Nicholson* (1876) 1 Ex.D. 428 ; *San Paulo (Brazilian) Railway Co.* v. *Carter* [1896] A.C. 31.

[2] *Kodak Ltd.* v. *Clark* [1903] 1 K.B. 505.

[3] *Erichsen* v. *Last* (1881) 8 Q.B.D. 414 ; *Wingate* v. *Webber* (1897) 34 Sc.L.R. 699.

that foreign corporations habitually carry on all kinds of business within this country. Strictly speaking the permission thus generously accorded is at variance with the principle of our own Companies Acts and with the theory of our law that corporate existence can only be granted upon terms sanctioned by the State. Why, it may well be asked, should we take such elaborate trouble to regulate our own companies and fence about their activities with all kinds of public safeguards, while at the same time we allow foreign corporations, of whose status we know nothing, to carry on what operations they please within our dominions? The answer is that such international tolerance is part of the 'comity of nations'; commerce and intercourse would be impossible without it, and we must only trust that foreign States exercise an adequate control over the privilege of incorporation within their jurisdictions.[1]

We must next consider how far foreign corporations are subject to the disciplinary control of the English courts. The law which determines this question proceeds upon the simple principle that the gift of juristic personality can only be withdrawn by the same power which bestowed it. From this it follows that a company registered

[1] See the remarks of the Privy Council in *Bateman* v. *Service* (1881) 6 A.C. 386; and Westlake, p. 389. In some cases these mutual privileges are secured by treaty, but these treaties have never been deemed to require parliamentary sanction, so they cannot be taken to effect any change in the law.

abroad cannot be dissolved in an English winding-up,[1] and, conversely, that a company registered in England can always be dissolved in England, even though its operations may have been conducted entirely abroad.[2] Indeed, in the case last cited Lord Hatherley and Lord Cairns went so far as to say that the fact of the business being entirely conducted abroad was, if anything, an additional reason for a winding-up. On the other hand, a foreign company trading in this country may be dealt with in an English winding-up so far as to make its English assets available for the satisfaction of its English creditors.[3] But the proceedings in this country cannot be carried to the extent of dissolving the body as a corporation, although they may result in its being wound up as an unregistered company;[4] and if winding-up proceedings are going on in the country of incorporation, the English proceedings must be treated as accessory to these.[5] But winding-up proceedings cannot be taken against a foreign company merely on the ground that it has agents in this country.[6]

[1] *Re Lloyd Generale Italiano* (1885) 29 Ch.D. 219.

[2] *Reuss* (*Princess*) v. *Bos* (1871) L.R. 5 H.L. 176; *Re Factage Parisien* (1864) 34 L.J.Ch. 140.

[3] *Re Matheson Brothers, Ltd.* (1884) 27 Ch.D. 225.

[4] *Re Commercial Bank of South Africa* (1886) 33 Ch.D. 174.

[5] *Re Matheson Brothers, Ltd., supra*; Kay, L. J. pointed out (at p. 229) that 'winding-up' and 'dissolution' are not necessarily synonymous.

[6] *Re Lloyd Generale Italiano, supra.*

The extent to which the creditors of a company have any rights against the individual shareholders depends wholly upon the law of its incorporation.[1]

It may be remarked that the nationality of a corporation is that of the country from which it derives its personality; and, as in the case of domicile, this is quite independent of the nationality of the individual members.[2] The practical result of this doctrine is that it wholly nullifies the very sensible rule that no foreign individual or corporation can own a British ship or any share therein; for it is always open to foreigners to form themselves into a company for the purchase of ships, and in this way our most important mercantile fleets may fall under the control of persons whose interests are wholly hostile to those of this country.

It may be generally laid down that, except for the purpose of assisting creditors in this country to the extent already indicated, the English court will not interfere in the internal affairs of a foreign corporation, since that might involve a conflict with the jurisdiction of the foreign court.[3]

Possibly owing to the stricter logic of continental legislators in developing their 'law of associations', our courts do not seem to have been faced with

[1] *Risdon Iron and Locomotive Works, Ltd.* v. *Furness* [1906] 1 K.B. 49.

[2] *Janson* v. *Driefontein Mines, Ltd.* [1902] A.C. 484.

[3] *Sudlow* v. *Dutch Rhenish Railway Co.* (1855) 21 Beav. 43.

any special difficulties in dealing with the case of foreign unincorporated societies. But in this connexion reference may be made to the question of charities, which are sometimes dealt with in European law by the device of personifying the charitable purpose itself. Our rule comes to this, that if money is given to a foreign charity the court will first of all inquire whether the object is one that can be lawfully accomplished abroad. If so, the court will pay the money to whatever person or body is authorized by the foreign law to receive payment, and will then pursue the matter no further. Our court will not attempt to settle a scheme for the administration of a foreign charity,[1] although it may allow the Attorney-General to apply to the foreign court for the settlement of such a scheme.[2]

The only other matters which seem to fall within the scope of this chapter relate to technical questions of procedure, such as the service of writs, and for these it is more convenient to refer the reader to the standard treatises for practitioners and to the commentaries on the Rules of Court. Here it is sufficient to say that the right of foreign corporations to sue in our courts seems to have been recognized for about two centuries,[3] while

[1] *Att.-Gen.* v. *Lepine* (1818) 2 Sw. 181; 1 Wils. Ch. 465; *Mayor of Lyons* v. *East India Co.* (1836) 1 Mo. P.C. 175.

[2] *Yeates* v. *Fraser* (1883) 22 Ch.D. 827.

[3] *Dutch West India Co.* v. *Henriques* (1724) Str. 612.

their liability to be sued depends upon the same considerations as govern the case of individual foreigners. It may even be possible in exceptional cases for a foreign society to assert in England a right of which it has been deprived by its own government within the foreign jurisdiction.[1]

[1] See *Rey* v. *Lecouturier* [1910] A.C. 262.

CHAPTER VIII

THEORETICAL QUESTIONS

The discussion of the more abstract principles of corporation law has occasionally been obscured the confusion of what are in reality separate by questions.

In the first place, a confusion is sometimes created by not distinguishing clearly between the legal and the philosophical, or the legal and the historical, aspects of the matter. Thus, for example, if we ask the familiar question 'Has the corporation a real group-will as distinct from that of its individual members?' the answer will usually be for the philosopher. The lawyer is under no obligation to answer such a question, and the law does not generally provide him with an answer unless litigation has proved or legislation has anticipated its necessity. Now it is almost impossible to imagine any lawsuit in which the judge must find himself driven to pronounce upon the existence or the non-existence of a group-will. The semi-philosophical expressions we find here and there in the Reports are invariably *obiter dicta*, and the true legal method of handling, or rather refusing to handle, such questions is well illustrated

by the Privy Council judgement in *Citizens' Life Assurance Co.* v. *Brown*, where Lord Lindley says :[1]

'If it is once granted that corporations are for civil purposes to be regarded as persons, *i.e.* as principals acting through agents and servants, it is difficult to see why the ordinary doctrines of agency and of master and servant are not to be applied to corporations as well as to ordinary individuals. These doctrines have been so applied in a great variety of cases in questions arising out of contracts and in questions arising out of torts and frauds ; and to apply them to one class of libels and to deny their application to another class of libels, on the ground that malice cannot be imputed to a body corporate, appears to their Lordships to be contrary to sound legal principles. To talk about imputing malice to corporations appears to their Lordships to introduce metaphysical subtleties which are needless and fallacious. Their Lordships concur with the view of the Acting Chief Justice in this case that if Fitzpatrick published the libels complained of in the course of his employment the company are liable for it on the ordinary principles of agency.'

That is the lawyer's way of looking at it. To illustrate the problem as it presents itself to the philosopher, I may perhaps be allowed to cite a passage from the well-known inaugural lecture of Professor Geldart at Oxford. He is pointing out some difficulties of the 'fiction theory', and cites as an illustration a decree recently passed by the University of Oxford :

'Not long ago this University passed a decree recording its gratitude for the munificence of another ancient

[1] [1904] A.C. at p. 426.

corporation. Gratitude and munificence are hardly legal conceptions: our own law has probably less regard for them than other systems. Gratitude and munificence are emphatically qualities of persons. Are we to say that one personality which has no existence outside the sphere of law records its gratitude for the munificence displayed by another equally fictitious personality? Courtesy, I hope, is not a fiction, legal or otherwise. Or shall we say that the decree is only a collective record of the individual gratitude of those (I fear few) members of Convocation who were present when it was passed? And how shall we attribute individual munificence to the members of a body whose gift was not derived from their private resources?'[1]

Now, for the lawyer this apparent difficulty has no existence. He would merely say that the courteous resolution referred to was not a matter with which the law had any concern. The law is only concerned to analyse such acts as have legal value or legal consequences; it does not profess to explain every possible expression of human activity. The only legal effect of the decree in this case was that the proper Oxford official was thereby authorized to record the terms of the resolution and convey them to the proper officials of the other body. Whether the gratitude expressed was or was not 'fictitious', whether it was the gratitude of the members present or the product of the 'group-will', are in the eye of the law wholly irrelevant questions. In other words, they are not questions which it can ever be necessary in any possible

[1] 27 *L.Q.R.* 95.

circumstances to answer in order to decide whether John Doe is to succeed in his action against Richard Roe. Whether the fiction-theory be right or wrong, it is obviously not discredited in the eyes of a lawyer by being unable to solve problems which do not call for any solution whatever in terms of law.

It must further be obvious that even the subject-matter of the inquiry will vary widely according to whether the inquirer is a lawyer or a philosopher. The philosopher is concerned with groups *de facto* and not with groups *de jure*. To him it is immaterial whether the association he is considering be technically incorporated or not. The Stock Exchange or the Inner Temple calls for the solution of the same problems as are afforded by a cathedral chapter or the Bank of England. On the other hand, he will disregard the 'one-man company', treating it (and rightly) as a mere mechanical device by which Mr. A. B. hopes to get the better of his creditors or otherwise to promote his temporal interests. Here, however, as we have seen, the law treats the technicalities of registration as being efficacious to bring a new 'person' into the world of legal being.

It need hardly be said that the purely philosophical problems are not those which this essay in any way endeavours to solve.

It is equally necessary to keep the province of the lawyer strictly apart from that of the historian.

If modern legal authority tells us that some particular thing is now necessary to constitute a corporation, the historian cannot demolish that doctrine by proving that in early times corporate personality was recognized upon other terms.[1] Nor is it even relevant to prove that bodies which are now admittedly corporate have an origin in history that does not conform to the modern legal theory. If the lawyer finds that the facts of history do not fit in with his theory, he can always make them do so by a fiction. He 'presumes' that something has happened which he, as well as the historian, knows to have been extremely unlikely. A modern rule of law does not cease to be a rule merely because it can only be made consistent by distorting historical facts.

The contrary view is an error into which we are sometimes led by mistaking the true functions of the 'historical school' of jurists; it is an error into which Maine himself would hardly have fallen. We see it in numberless things besides law. For example, we are told (rightly or wrongly) that Christmas can be traced back to a pagan festival; and this apparently leads, by some devious process of thought, to the conclusion that it is not now a Christian festival, and that Christianity therefore is an error arising out of the superstition of the

[1] Dr. Rashdall points out (29 *L.Q.R.* 79) that 'it was not apparently till the fifteenth century that the idea gained ground that a corporation could be called into existence only by a definite act of the State.'

Middle Ages. So again, it is said that clothes were originally worn not from modesty, but from the opposite motive ; whence, it is argued, our modern notion that it is decent to wear clothes is wholly conventional and unreasonable. Coming back to our own subject, we may find an example in Mr. Carr's book, where he attacks the 'concession theory' as follows :

'The concessionists declare that corporateness is a special privilege which is the gift of the State. . . . There must initially be some formal act indicating that permission has been given by the sovereign power. . . . There can be no formless corporation. That is the language of pre-registration times : it is still spoken. But is it true that there were never any corporations of formless origin ? Is there never a corporation which the State does not create ? For the sake of their canon the concessionists allowed themselves to be deceived by the fiction of a lost grant. But exceptions spoil their rule. The University of Cambridge is itself a corporation by prescription. Corporateness by prescription was recognized even by those Italian lawyers to whom the concessionists were most indebted.'[1]

It is, of course, untrue to say that the concessionists are 'deceived' by their fiction, any more than Coke and Blackstone were deceived by the procedure in a common recovery. What has happened is, of course, a common tale. We have a modern principle of law, rational and consistent, and governing every new case that can arise. But we have at the same time a few cases of ancient bodies corporate which obtained recognition at

[1] Carr, p. 174.

a time before the modern principle was developed and applied. No definite alteration in the law can be pointed to, and the theory (in itself a fiction) that no change in law can take place except by statute compels us to bring these exceptional cases into harmony with the modern rule by a palpable fiction. But the fiction deceives no one, and the rule remains a sound rule upon which any lawyer may advise his client.

Here, again, this essay must disclaim any intention of trespassing upon the province of the historian. It is not our function here to inquire what was the conception of a corporation held by the mediaeval lawyers, except so far as it has left any permanent impression on our system.

Nor can we aim at formulating a general theory of corporate personality which shall apply to all civilized bodies of law. It is probable, indeed, that no such general theory can be stated in terms sufficiently precise to be of any value. Whether any particular bodies shall or shall not be granted the attributes of juristic persons is a matter upon which each system of law is at perfect liberty to make—and does make—its arbitrary choice in every case.[1] How arbitrary the choice may be can easily be seen if we take the case of a partnership. In England the partnership firm is not a legal

[1] The law can even treat an idol as a person, if necessary; *Maharaja Jagadindra &c.* v. *Rani Hemanta &c.* (1898) L.R. 31 Ind. App. 203.

person ; cross the Tweed and it gains personality. For practical purposes it makes very little difference, and the Partnership Act of 1890 lays down the law for both countries in identical terms.[1] The very same body may indeed be treated as corporate in some jurisdictions, and unincorporate in others. Thus American courts sometimes recognize a *de facto* corporateness, independent of formalities, of a kind that can only be impugned by the State ; and on this principle the court has even gone so far as to treat as corporate an English company trading in America, although the company was not incorporated by English law.[2]

In view of such facts as these it would seem impossible to conclude that general jurisprudence can help us to determine any questions about the true nature of legal personality. If such personality depends upon any permanent or essential characteristics, every legal system will be compelled to recognize it wherever it occurs, under penalty of otherwise causing grave injustice. Human personality, for example, depends upon certain natural facts, and so long as the law is content to adapt itself to those facts the results are everywhere substantially similar, and to a certain extent necessary. Thus all systems recognize that infants and idiots must be deprived of many of the legal

[1] One or two differences of detail are expressly noticed (ss. 9 and 47).

[2] *Liverpool Insurance Co.* v. *Massachusetts* (1870) 10 Wall. U.S. 566.

consequences of personality. But where the law refuses to recognize personality in any class of normal adult men, it produces that particular form of injustice known as slavery. This is due to the pressure upon the law of necessary natural facts beyond its control.

When, however, we come to the corporate or quasi-corporate person, we find the conditions wholly different. In some cases it will be possible for the recognition of personality to be granted or withheld without substantially affecting the practical results. Thus the rights and liabilities of partners are for almost all purposes the same in Scotland as in England, although the former country recognizes the personality of the firm and the latter does not. Or, again, it would seem in England (since the decision in the *Taff Vale Case*) that for the purpose of civil liability in tort it does not very much matter whether an association possesses a personality recognized by law or not. If any body of men wishes to obtain exemption from such liability it must now get it from Parliament, as the trade unions have succeeded in obtaining it by the Act of 1906. In other words, the liability does not depend upon any theories of personality, but exists, except so far as it may be modified or removed by the arbitrary discretion of the legislature; and Parliament in settling these matters may be guided by many other motives than a desire for working out legal principles to a logical conclusion. All

this is because corporate personality is not a natural and necessary fact which forces itself upon the recognition of the law.

Nor is the function of the State limited to the mere concession or withholding of personality. The amount of personality conceded may itself vary within the widest limits, and the degree to which it shall be granted is a matter of the most absolute discretion. Where a corporation is created by charter, any restrictions may be inserted that the king or his advisers think fit ; [1] if the proposed members do not think the charter worth having they need not accept it, but they must accept or reject it as a whole. They must take the disabilities along with the privileges. If the corporation is statutory, the right of restriction is still clearer, for the corporation can have no powers save those which are to be found—expressly or impliedly—within the four corners of the Act. Nor is this any the less so because most of our modern corporations obtain their personality by mere compliance with the simple formalities prescribed in a general Act. This modern facility of incorporation is treated by Mr. Carr [2] as a serious objection to the ' concession theory '. But it does not seem that corporate personality is any less the gift of the State merely because the State prescribes in general terms the conditions upon which it is to be granted.

[1] Grant, p. 13. [2] p. 174 ; see above, p. 133.

If the suggestions made up to this point are sound they seem to lead necessarily to what is known as the 'concession theory' of corporate origin; that is to say, that legal personality is a gift lying in the uncontrolled discretion of the sovereign power, and always subject to whatever conditions the sovereign power may choose at the time of granting to impose. Once again, let us remember that this only professes to explain the matter from the point of view of the lawyer (that is to say, the modern lawyer). We are not here concerned to discuss the psychology of a corporate meeting, any more than the psychology of a mass meeting in Trafalgar Square. Nor is the assertion of the modern principle intended to imply that this has always been the principle of English law, or that our more ancient corporations do in fact owe their origin to any sovereign act. Nor, again, must we attempt to evade or minimize the real conflict which undoubtedly exists between the strict legal theory and the theory implied by ordinary thought and language. The man in the street may think, and think with reason, that the Stock Exchange is substantially no less corporate than the Bank of England. But the law, so long as it remains unaltered, must disregard his opinion just as much as it disregards his inability to distinguish between the assignment of a lease and a sub-demise for the whole term save one day. So, on the other hand, the law is compelled to see

a legal 'person' in Salomon & Co., Ltd., where the layman—and the Court of Appeal—can see only an *alias* for Mr. Aron Salomon.[1] It is of course unfortunate that legal theory should conflict thus sharply with ordinary ideas, especially when, as in this case, it is every-day speech which expresses accurately the facts of life, and the legal theory which falsifies. It is probably a sense of the mischief worked by this incongruity which has led American judges to recognize the corporation *de facto*. But it is too late now to do that in England without the help of Parliament, although the *Taff Vale Case* and the Rules of Court permitting 'representative actions' certainly point in that direction. At present it is best to admit candidly that the legal doctrine has in point of fact diverged widely from the language and ideas of ordinary life. The result of course is that unless and until the two are brought into harmony by legislation, we must abandon the attempt to formulate any general theory of personality which, while accurately summing up the law, will at the same time satisfy the historian, the philosopher, and the ordinary man. As an explanation of the rules of the living law, Blackstone's general principle holds good and cannot be better stated than in his own words:

'With us, in England, the king's consent is absolutely necessary to the erection of any corporation, either impliedly or expressly given.'[2]

[1] [1897] A.C. 22. [2] i. 472.

So far we have been dealing in this chapter only with the personality of those bodies that are corporate in the strict legal sense. When we come to ask how far the law recognizes collective personality in those that are not corporate, the answer is more difficult. Technically, of course, it recognizes in them no personality at all; but as a matter of substance we cannot ignore the fact that for some very important purposes it treats corporate and unincorporate associations practically alike. 'It cannot matter in the least,' said Lord Macnaghten in the *Taff Vale Case*, 'whether persons acting in concert be combined together in a trade union, or collected, or united in any other form of association.'[1] So also in cases of capacity we find that the contract between the members of an unincorporate body really raises the same questions of *ultra vires* as are raised by the charter or memorandum of a corporation, except only that in the former case the concurrence of all the members can extend or modify even the fundamental purposes of the association.[2] Again, although a member of an unincorporate body cannot contract with it, as a corporator can contract with his corporation, yet he can make a contract with all the other members individually. The other members are then represented for this

[1] [1901] A.C. at 438.

[2] But even a company memorandum may in a proper case be altered by leave of the court. (8 Ed. VII, c. 69, s. 9.)

purpose by the secretary, or perhaps by a waiter,[1] and thus the fictitious person of corporation law is supplanted by an agent whose agency is hardly less fictitious. The device, however, has the effect of concealing for most practical purposes the gap which is left by the absence of formal incorporation. So, too, with regard to the holding of property we know that by setting up a body of trustees who are being continually renewed, practically the same results are achieved as would be obtained by vesting the property in a body corporate.[2] Of course it is true that the members of an unincorporate body may upon its dissolution divide the property among them, whereas the property of a defunct corporation reverts to the grantors. But even this is only partly true in modern law. On the one hand, the members of an unincorporate body are not allowed to pocket the property where it is subject to any 'purpose-trust;' and on the other hand, statute now provides that in the commonest kind of modern corporation—the ordinary limited company—the property shall, after satisfying the claims of creditors, be distributed among the corporators. Finally, we may

[1] *Graff* v. *Evans* (1881) 8 Q.B.D. 373; *supra*, p. 85.

[2] The analogy is carried so far that although the members of an unincorporate association are nominally co-owners they do not enjoy the right of partition which is a normal incident of co-ownership; they are only entitled to use the common property in so far as it is consistent with the common purposes. See *Re St. James's Club* (1852) 2 D.M. and G. 383, at 387.

note that modern taxing statutes do not, generally speaking, discriminate between the property of corporate and unincorporate associations.[1]

We have now reached a point at which we may conveniently try to summarize some of our results, and see how far they can be comprehended under general statements.

In the first place, it is quite clear that much of the older theorizing about corporations must go by the board. Coke, it will be remembered, laid down that a corporation can commit no crimes and cannot even be sued in tort;[2] nor, according to his doctrine, could it even be seised of lands to a use.[3] This language we find repeated by Blackstone, and even in quite recent times the same doctrine (so far as wrongs depending on 'malice' are concerned) is preached in vigorous language by Lord Bramwell.[4] But in spite of all these great authorities, the actual law of to-day is quite different, and it is to the living law that our theories, if any, must be made to conform.

Secondly, we must recognize that the distinctions

[1] See the Income Tax Act, 1842 (5 and 6 Vict. c. 35), s. 40; and *Curtis* v. *Old Monkland Conservative Assoc.* [1906] A.C. 86.

[2] 10 Rep. 32.

[3] The theory that a corporation cannot be a trustee was put forward by counsel as late as 1743, but Lord Hardwicke treated the modern rule as too well settled for argument (*A.-G.* v. *Landerfield*, 9 Mod. 286). See also *Re Thompson's Settlement Trusts* [1905] 1 Ch. 229.

[4] See *Abrath* v. *N.E. Railway Co.* (1886), 11 A.C. 250.

which our law draws between corporate and non-corporate bodies do not correspond to any substantial or necessary differences in the nature of those bodies. Consequently, the language of the law is here widely at variance with the language of the lay-folk, which naturally tends to adapt itself roughly to the substantial facts of life. In other words, the recognition of legal personality is a subject which our law treats in a purely arbitrary manner, and further the *quantum* of such personality is again a matter within the arbitrary discretion of the law.

Thirdly and chiefly, we must recognize that the technical distinction between corporate and non-corporate bodies has for a large number of purposes ceased entirely to have any practical consequences.

With these main facts before us, let us turn to the chief problems which the law in its present state presents. Putting aside as purely philosophical the discussions about the 'group-will' and the 'reality' of the corporate person, we find that the chief theoretical problems for legal solution may be grouped under two heads. One of these is to discover the true principle upon which to decide questions of capacity. The other is to decide what is the true legal nature of corporate ownership.

First, as to capacity. Now, quite apart from any question of corporations, we start with the fact that even among natural persons different degrees of capacity are fixed by positive law. Nor do the rules of law upon this subject confine

themselves to defining the incapacity of those who, like children and lunatics, are under obvious natural limitations. We have a host of rules, many of them quite peculiar to our own system, for limiting in various ways the contractual capacity of adult and normal men. A barrister can make no contract for his fees and a workman cannot contract himself out of the Compensation Acts.[1] All men alike are incapable of binding themselves by a contract of a gambling nature—not because it is naturally impossible, nor even because it is prohibited,[2] but because it is declared by statute to be—if made in England at any rate[3]—an agreement that creates no obligation.[4]

It would then seem to lie entirely within the discretion of the legislature to say how far the legal capacity even of natural persons shall extend. In determining the actual rules the legislature will of course be guided by considerations of policy, and these considerations will inevitably be modified by a number of causes quite uncon-

[1] The extent to which the poorer classes are being deprived by law of the power of contracting according to their own judgement is indeed one of the most prominent features of recent legislation.

[2] Cf. *Hyams* v. *Stuart-King* [1908] 2 K.B. 696.

[3] See *Saxby* v. *Fulton* [1909] 2 K.B. 208.

[4] Lunatics, on the other hand, are deemed capable of binding themselves by contract in certain circumstances; see *Imperial Loan Co.* v. *Stone* [1892] 1 Q.B. 599, and *Re Walker* [1905] 1 Ch. 160; also discussions in 17 *L.Q.R.* 147 (Professor Goudy), and 27 *L.Q.R.* 313 (Mr. Ambrose).

nected with the logical development and application of purely legal principles. If this be true of natural persons it must *a fortiori* be true of corporations or artificial persons; for the former are, after all, necessarily to a certain extent independent of positive law, whereas the latter are its creatures; and even if in the eye of the philosophers, corporations have a *de facto* existence apart from the law, it is nevertheless an existence wholly dependent upon the wills and consent of their members. The conclusion then to which we come is, that in ascertaining the capacity of a body corporate we cannot safely rely upon any general principles as to what are the powers necessarily inherent in a corporation as such. All we are entitled to inquire is, By what considerations of policy was the Crown or legislature guided in creating this particular corporation? When we have settled the question in this form, the answer becomes a mere matter of interpretation, for the rules of English law do not allow us to find an answer except in the actual language used. The principle is exactly the same where the body is not technically corporate. Here, however, we are not generally concerned with the sovereign power, for an unincorporate body usually derives any authority it may possess from the wills of those who form it; and it is in the agreement by which they have bound themselves together that the answer to the question must be found.

The other problem may also be approached in the same way. There can be no need to define the legal nature of corporate ownership unless we are first prepared to define individual ownership. Here the number of definitions that already crowd the books of jurisprudence might itself be a warning to the theorist. The reason is that positive law is not concerned to formulate any theory of ownership, but only to indicate as clearly as it can what individuals are entitled, and to what extent they are entitled, to the beneficial enjoyment or control of physical matter. Again, let us put corporations aside for the moment, and confine ourselves to natural persons. Here we shall find that the nature of the enjoyment and control permitted by law varies not only with the individual concerned, but also with the nature of the property. The complexity of the actual rules is almost infinite. For example, I am entitled to the exclusive control of my cigarettes; but if I were under sixteen I might (for that reason only) be forcibly deprived of them by a policeman. Or again, my enjoyment of a pistol is hampered by a number of restrictions which do not apply to the enjoyment of my walking-stick. Take the right of alienation; we shall find that the sale of beer is governed by totally different rules from those which apply to the case of ginger-beer. In short, even when we are dealing with purely individual rights over material things we find that

their diversity is too great to be explained by anything but the various reasons of policy which have found weight with those who determine what the law shall be.

But carry the process a step further. The law permits two or more individuals to have concurrent rights in the same thing. From this arises the whole vast structure of trusts, joint tenancy, tenancy in common, limited interests and future estates, easements, and so on. It so happens that the first two of these doctrines are sufficient to explain nearly all the cases of ownership by unincorporated bodies. But all that we need dwell on here is, first, that the law admits the possibility of two or more individuals having interests in the same thing at the same time; and secondly, that the law has a number of different schemes by which particular cases of such complex ownership are governed.

Now it does not seem necessary to regard the law of corporate ownership as being anything more than another of those numerous devices by which the law regulates cases of concurrent and therefore possibly conflicting interests in the same property. As a matter of fact, the use of so general a term as 'corporate ownership' is in itself rather misleading, since the laws relating to different corporations differ so widely from one another. To ask, What is the interest of a corporator in the corporate property? is really an

idle question until we have asked, What kind of corporation are you talking about? The fellow of a college has generally a right to use the buildings and grounds within certain limits; but a railway shareholder has less right than a railway porter to set foot on the property of his corporation. Even within any one corporation the rights of individual members differ from one another. The head of a college may have access to parts of the building to which the fellows have no key; and the scholars, who are also corporators, have still more restricted rights, and have no voice whatever in the administration of the property. So again, the fellow of a college transmits no interest in the corporation to his personal representatives, while the opposite is the case of the shareholder in an ordinary trading company. Once again the conclusion to which we are driven is, that it is quite impossible to frame any general statement of any value as to the interest of corporators as such in corporate property. We can do nothing more than define the interest of particular corporators in particular corporations, and to do this we must look to the positive rules of law governing the particular case.

Here it may well be said: if it be true that the corporation is merely a piece of legal machinery for achieving certain practical ends, and a machine wholly dependent for its nature and energies upon the arbitrary discretion of the lawgiver, what

right have we to be talking about legal 'personality' at all? All the law is concerned with is to define capacities and liabilities, or to prescribe the exact means by which certain classes of property shall be administered.

It may at once be admitted that if the argument advanced in this essay is sound, such an objection cannot really be met. 'Personality' is in fact a term which, strictly speaking, belongs to the language rather of philosophy than of positive law; and it is perhaps to be regretted that it has ever been allowed to find a place in the legal vocabulary. If we look at the matter closely, the powers of corporations are only the powers of individuals acting under certain conditions and through certain forms; and the liabilities of a corporation really mean the right of a plaintiff to claim damages (in default of performance), or of the Crown to claim a penalty out of certain specified property. When we ask whether a trade union is liable in tort, we really mean: Is A, who has been wronged by union officials acting in the scope of their employment, entitled to be compensated out of certain funds subscribed by a large number of persons for certain purposes?

In short, the truth seems to be that the law is concerned, not with the difficult and elusive notion of collective personality, but with the much more comprehensible subject of individual capacity. It does not try to define the personality of a

corporation, any more than it tries to differentiate between the personality of a child and that of an adult. But it is no less prepared to define the capacity of those who act on behalf of associated individuals, than it is to define the respective capacities of the adult and the child. The word 'person', however frequently it may occur in statutes and judgements, is really a popular expression, for which the law is not prepared, if pressed, to offer any formal definition.[1]

Our search for general theoretic principles may perhaps seem to have produced only negative results. Yet it may still be claimed that the law has not failed to give an answer in any case where a legal answer may fairly be demanded, and further, that these answers are based on legal principles which are, on the whole, both reasonable and easily understood. It is no discredit to the law if it keeps to its own province, and declines to solve all the problems which the ingenuity of

[1] It is of course possible, and sometimes it is perhaps even necessary, that those who determine the actual rules of the law should be guided in so doing by philosophical ideas of some kind; and the rules of law may vary widely according to the philosophical notions entertained—consciously or unconsciously—by the lawgivers. But these abstractions cannot be expressed in the law itself, which can only define the capacity of individuals to do this or that outward act; and it is quite possible for legislators with utterly divergent theories of personality to concur in the actual wording of a statute or decision.

philosophers and historians may propound; and perhaps it is not too much to say that no problem of association law has ever presented any fundamental difficulty to the lawyer except when it has been confused by the introduction of matters which are really alien to legal science.

APPENDIX

I

THE DOCTRINE OF POPE INNOCENT IV

The purpose of this essay being an inquiry into the principles of the existing English law I have not generally made more than a passing reference to the rules of other systems, whether ancient or modern. But I may perhaps be allowed to enlarge a little upon the casual allusion in Chapter III to a decretal of Pope Innocent IV, partly because it is often misunderstood, and partly because the Pope's view, as expanded by himself, is really a very fair account of the practical solution which has been reached independently by our own law.

To begin with, we must note the actual wording of the passage, which is as follows:[1]

'In universitatem vel collegium proferri excommunicationem penitus prohibemus, volentes animarum periculum vitare, quod exinde sequi posset, quum nonnumquam contingeret innoxios huiusmodi sententia irretiri; sed in illos dumtaxat de collegio vel universitate, quos culpabiles esse constiterit, promulgetur.'

Now this decree was propounded at the Second Council of Lyons in 1245, and the first thing to notice is that this practice of excommunicating corporations, which Pope Innocent now condemns, was referred to as a normal and recognized practice in a decretal of Gregory IX issued in 1234.[2] Secondly, we must remember that the punishment of communities in various ways was a familiar

[1] VI, xi, 5, 5; Richter and Friedberg's ed., vol. ii, p. 1095.

[2] X, ii, 25, 11. The decretal was elicited upon a question of procedure arising out of the excommunication of a chapter, but the excommunication itself was not impugned by anyone.

feature of mediaeval politics, and any one who declared it to be impossible would have been laughed at as an academic theorist who took no account of everyday facts.

Bearing this in mind, let us return to the actual language of the decretal. The Pope does not declare the punishment of corporations to be impossible, nor does he forbid all kinds of punishment. What he does say is that *universitates* are no longer to be excommunicated. The reason he gives for this is not theoretical but strictly practical. The excommunication of such bodies is forbidden, not because they are legal fictions, but because such a sentence would involve the innocent along with the guilty.

No theoretical question was as a matter of fact involved in this decision, since a sentence of excommunication upon a *universitas* was not regarded by any one as a sentence upon a body corporate, but merely as a summary method of excommunicating all the individuals who composed it. A moment's consideration will make it clear that no other view was possible at any time. No one can be excluded from communion who is not in communion, and no one can be in communion who has not been baptized and confirmed; and it is obvious that both these privileges are from their very nature restricted to natural persons. As one of the old commentators puts it, 'excommunicatio requirit verum corpus et animam baptizatam.'[1]

So much for the decretal, which we are so often told was based upon the 'fiction theory'. We are now in a position to go a step further. Innocent was not only a legislator but a lawyer, and shortly after the Council of Lyons he published his *Apparatus* or *Commentaria* upon the first five books of the Decretals. In this he elaborates his views upon this subject, and it may again be worth our while to quote him at some length. At folio 231 of the

[1] Panormitanus (fifteenth century) on X, iii, 49, 7.

Venetian edition of 1578 (*sub v.* '*Gravem*') we find him saying:

'Hic non erant excommunicati, quia nec fecerant, nec fieri mandaverant, nec in mora erant delendi, vel officium dimittendi. . . . Istae speciales personae excommunicantur pro proprio delicto. Universitas autem non potest excommunicari, quia impossibile est, quod universitas delinquat, quia universitas, sicut est capitulum, populus, gens, et huiusmodi, nomina sunt iuris, et non personarum: et ideo non cadit in eam excommunicatio. Item in universitate sunt et pueri unius diei. Item eadem est universitas quae est tempore delicti, et quae futuro tempore, quo nullo modo delinquunt. Esset autem multum iniquum, quod huiusmodi, qui nullo modo delinquunt, excommunicarentur. . . . Item universitas nihil potest facere dolo[1]. . . . Fatemur tamen, quod si rectores alicuius universitatis, vel alii aliquid maleficium de mandato universitatis totius, vel tantae partis, quod invitis aliis maleficium fecerint, vel et sine mandato fecerint, sed postea universitas, quod nomine suo erat factum, ratum habet, quod universitas punietur speciali poena suspensionis et interdicti. . . . Item poena capitali vel mortis, vel relegationis, non[2] punietur universitas, si contra eam agatur criminaliter lege Cornelia de sicariis vel lege Iulia de vi publica vel quacunque alia. Sed poena capitis mutabitur in pecuniariam. . . . Quidam tamen dicunt, et forte non male, quod et si possit contra universitatem agi civiliter vi bonorum raptorum et legis Aquiliae et iniuriarum et aliis huiusmodi, quibus irrogatur poena pecuniaria, non tamen potest contra eam agi criminaliter. Sententia autem contra universitatem mandabitur executioni in bonis universitatis, si habet aliqua communia: et si nihil habet commune, privabitur privilegio universitatis, ut ulterius non sit universitas, et sic patietur capitis diminutionem. . . . Item dicunt quidam, quod fiet collecta pro solvendis huiusmodi poenis per libram et solidum et ab ista collecta erunt immunes illi, qui contradixerunt maleficio, pueri et alii, qui omnino sunt sine culpa. Alii tamen dicunt nullum ab hoc eximi.'

[1] Here there is a reference given to the Digest, IV, iii, 15, 1.

[2] The Venice edition omits *non*, but the older editions have it, and it is clearly right.

So, again, we find him saying at folio 206 (*De simonia* : *sub v.* '*Dilectus filius*') :

'In criminibus hoc dicimus, quod universitas non potest accusari, nec puniri, sed delinquentes tamen : civiliter autem conveniri, et pecuniariter puniri potest ex delicto rectorum.'

We may conclude these quotations with two short passages from the canon law texts. One is from another decretal of Innocent, in which he is condemning the practice of making extortions from churches (VI, iii, 20, 4) :

'Adiicimus districtius inhibendo . . . ut nec collegium, nec universitas, nec aliqua etiam singularis persona, cuiuscunque sit dignitatis, conditionis, aut status, . . . talia exigat, vel extorqueat, per se vel per alium suo nomine vel etiam alieno, aut eas (sc. ecclesias) ad huiusmodi persolvenda compellat. Qui vero contra fecerint, si personae fuerint singulares, excommunicationis : si autem collegium vel universitas civitatis, castri, seu loci alterius cuiuscunque, ipsa civitas, castrum, vel locus, interdicti sententiam ipso facto incurrant.'

The other is from a long decretal of Urban IV in the *Extravagantes Communes* in condemnation of simony (*Com.* v, 1) :

'Nos enim, qui secus egerint, si sint singulares personae, tam dantes, quam accipientes, huiusmodi excommunicationis : si capitulum vel conventus fuerit, suspensionis sententiis decernimus subiacere.'

We are now in a position to ask how far Innocent held the 'fiction theory', or indeed any other theory, of corporate personality. The only words in all these texts which even suggest it are contained in the statement that corporate bodies are incapable of *sin* (*delinquere*), since the words which describe them are *nomina iuris et non personarum*. These words are spoken with reference to the penalty of excommunication alone, and a few lines lower down we have the definite statement that there are other penalties which are properly applicable to such bodies :

punietur speciali poena suspensionis et interdicti. The reason given for prohibiting excommunication in such cases is that it would involve the condemnation of innocent individuals, *pueri unius diei,* and others who could not possibly be guilty in any moral sense of the word. But no difficulty is felt about making a corporation liable *civiliter,* or, as we should say, in tort, for the acts of its officers in certain circumstances. The remedy against such a body consists in levying execution upon its property, *si habet aliqua communia*; and if it proves to be insolvent, then *privabitur privilegio universitatis,* just as we can wind up a limited company under similar conditions.

In short, Pope Innocent was concerned, like other legislators, with finding a reasonable solution for certain practical difficulties, and not with the working out of purely speculative theories. He was forced to condemn an existing usage, not because it violated an abstract formula of philosophy, but because it was found in practice to produce unjust and unreasonable results. But in cases where no injustice was occasioned to individuals, Innocent found no more difficulty than we do in enforcing the liability of corporations. We agree with him, as Coke and Blackstone laid down long ago, in saying that a corporation cannot be excommunicated; but he agrees with us in holding that a corporation can in certain circumstances be made liable in tort. If the liability is greater in English law, that result is due, not to any different theory about personality, but to our peculiar rules of agency. With regard to crime it is true that there is a difference. Innocent lays it down without any qualification that *in criminibus . . . universitas non potest accusari, nec puniri, sed delinquentes tamen*; and, as we have seen, our present law does hold that a corporation can in certain cases be criminally punished. But if an English lawyer of a century ago had been asked for his opinion, he would probably have said that the immunity

of corporations from criminal prosecution was quite unqualified. The very limited liability which we now recognize has in point of fact been necessitated by the enormous development of commercial companies in the course of about a century, which has compelled us to penalize corporations for certain kinds of misconduct committed in the course of their business. But if asked whether a corporation could be punished *de sicariis* or *de vi publica*, a modern English lawyer would give the same answer as Pope Innocent IV.

II

THE CHANCELLOR'S PRIVILEGE AT OXFORD

The privilege of the Chancellor of Oxford University to which Blackstone refers (see p. 14) is contained in the charter of 14 Henry VIII, s. 25 :

'Praeterea concedimus et per presentes volumus quod dictus Cancellarius ac eius absencia Commissarius seu eius deputatus et eorum successores imperpetuum ex assensu Magistrorum in congregacione pro tempore existencium assemblatorum unitorum et congregatorum faciant et auctoritatem faciendi habeant corporaciones statuta et ordinaciones cum penis ad obligandos omnes et singulos inhabitantes dicte ville Oxon tam mercandisas suas quam vitellarios sua victualia et alios quoscumque vulgariter dictos *Glovers Cordewyners* et *Chaundelers* ibidem commorantes res suas venales quascumque enormiter vendentes de tempore in tempus ordinent statuant et faciant imperpetuum aliquo statuto in contrarium ante hec tempora edito sive ordinato non obstante' (*Registrum Privilegiorum Almae Universitatis Oxoniensis*,[1] p. 67).

I am indebted to the Keeper of the Archives (Mr. R. L. Poole) for directing my attention to this charter, and also for the following information :

'Although the Municipal Corporations Act, 5 & 6

[1] Privately printed in 1770.

Will. IV, c. 76, by s. 137 expressly reserved the privileges, &c., of the Chancellor of the University, it flatly contradicted itself by placing the City of Oxford in Schedule A, which contained the names of boroughs as to which all charters, &c., inconsistent with the provisions of the Act were repealed.

'I should not like to say at what date the power of creating a new corporation in Oxford was last exercised, but I find that existing corporations were regulated by the Vice-Chancellor in 1796 (Barbers) and 1814 (Booksellers).'

III

CHURCHES IN THE MODERN STATE

The proofs of this essay were nearly through the press before I had an opportunity of reading Dr. Figgis's valuable and important lectures on *Churches in the Modern State* (Longmans, 1913). I have come across no book in which some of the great practical issues arising out of this branch of law are more vividly set forth, and with the main principles for which Dr. Figgis contends I find myself heartily in agreement. But writing from the purely legal point of view I think he has exaggerated the failure of our law as it stands to grasp the conception of collective personality, or, as he puts it, 'the refusal of the legal mind of our day to consider even the possibility of societies possessing an inherent, self-developing life apart from such definite powers as the State, or the individuals founding the body under State authority, have conferred upon them explicitly.'

This criticism of Dr. Figgis is principally based upon the decision in the *Free Church Case*,[1] to which we must therefore return; and the real ground of that decision is best brought out by contrasting it with the earlier case of *Forbes* v. *Eden*.[2] The corporate act of which Mr. Forbes

[1] *Ante*, pp. 39–48, 112–14.
[2] *Ante*, p. 40.

complained was a canon which displaced the Scottish Liturgy in favour of the Communion Office from the English Prayer Book. No proprietary interest was infringed by the alteration, and the pursuer was merely asking for a declaration that the new canon was *ultra vires*. The answer to his claim was that he had accepted the XXXIX Articles, which expressly declare that the Church has authority to deal with such matters, and also the Scottish Canons of 1838, which contain a similar provision.

It is therefore manifest from this case that our law is prepared in certain circumstances to recognize what Dr. Figgis calls 'a true society with a living will and power of change'. On the other hand, Dr. Figgis would himself agree that this power of change can never—even apart from any question of law—be quite unlimited; that in the Church of England, for example, there are changes which could not be made without forfeiting not only her legal, but also her spiritual identity as a Church. The question therefore becomes merely a matter of degree. How are we to draw the line within which this power may freely be exercised?

Now the way in which our law has answered this problem is to say that the matter is one which must be determined in the first instance by the society itself. If a Church claims from the very start authority to deal with rites and ceremonies, or even with doctrines for that matter, that liberty will always be allowed her by the Courts. If, on the other hand, she takes the responsibility of maintaining some doctrine or practice as unalterable, then she will be asked to abide by that decision. And it should be remembered that the interference of the Courts can only be invoked where material interests are involved. No possible scheme can ever exempt the civil courts from the duty of deciding who is the legal owner of property within their jurisdiction, and they cannot reasonably be asked to bestow the property of those who have main-

tained upon those who have denied a fundamental article of faith, merely because the latter are more numerous. But the spiritually corporate reality of a Church is not a matter of civil law at all, and is therefore quite unaffected even by an erroneous decision of the Courts upon the question of property.

As we have already noticed (p. 44), the legal principle in the *Free Church Case* was regarded as being beyond dispute, and the question between the parties was really one of fact. They differed only in their interpretation of the events of 1843. Did the Fathers of the Disruption intend, or did they not, that the 'Establishment principle' and the authority of the Westminster Confession should lie beyond the legislative competence of the Church? The adoption of the former view certainly could not be taken as committing the Lords to any theoretical doctrine about the nature of the Church as a spiritual society.

The practical difficulties which have arisen from the application of our present rule might perhaps be avoided by the adoption of some such principle as has been suggested on p. 46. But even then we must remember that cases may arise where the society has committed itself too deeply to the doctrine of 'no change' for any court to help it. Thus, for example, the Wesleyan Methodists of Ireland in 1871 deliberately procured an Act of Parliament[1] in which it was laid down that their doctrines (as defined in a schedule) should be immutable, although rules of government and discipline should be subject to revision. In the face of such action as this it would be manifestly impossible for the Court to allow the society any power of doctrinal development so far as questions of property might be affected thereby.

[1] 34 & 35 Vict. c 40.

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